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New York (State) Courts

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# THE MISCELLANEOUS REPORTS

CASES DECIDED

IN THE

# COURTS OF RECORD

OF THE

# STATE OF NEW YORK

OTHER THAN THE

**Court of Appeals and the Appellate Division of the Supreme Court**

WILLIAM V. R. ERVING, REPORTER

VOLUME CXIV.

1921

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8 Appointed by the Governor Jan. 12, 1921, to succeed Emory A. Chase, elected to Court of Appeals.

9 Appointed Feb. 7, 1921, in place of William H. Wadhams, resigned.

10 Appointed Dec. 28, 1920, in place of James T. Malone, deceased.



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# CASES REPORTED IN THIS SERIES WHICH HAVE BEEN AFFIRMED OR REVERSED.


| | VOL. | PAGE. |
|---|---|---|
| Alterman v. Home Insurance Co.<br>Reversed: 195 App. Div. 151. | 112 | 445 |
| Bulova v. Barnett, Inc.<br>Reversed: 194 App. Div. 418. | 114 | 94 |
| Burgess Bros. Co., Inc. v. Stewart<br>Affirmed: 194 App. Div. 913. | 112 | 347 |
| Clough v. Gardiner<br>Affirmed: 194 App. Div. 923. | 111 | 244 |
| Cockcroft v. Mitchell<br>Affirmed: 187 App. Div. 189; 230 N. Y. 630. | 101 | 211 |
| Cooper-Snell Co. v. State of New York<br>Affirmed: 230 N. Y. 249. | 109 | 96 |
| Coyne v. Town of Greenburgh<br>Reversed: 194 App. Div. 861. | 110 | 598 |
| Dunbar v. Sweeney<br>Modified: 230 N. Y. 609. | 99 | 373 |
| Eagan v. City of Buffalo<br>Affirmed (sub nom. Egan v. City of Buffalo): 188 App. Div. 953; 230 N. Y. 575. | 105 | 506 |
| First Construction Co. v. State of New York<br>Affirmed: 194 App. Div. 608. | 110 | 164 |
| Gambrill Mfg. Co. v. American Foreign Banking Corp.<br>Reversed: 194 App. Div. 425. | 113 | 448 |
| Guttag v. Shatzkin<br>Affirmed: 230 N. Y. 647. | 113 | 362 |
| Hausner v. Wickham<br>Affirmed: 186 App. Div. 931; 230 N. Y. 578. | 105 | 735 |
| Heckscher Building Corp. v. Melton<br>Affirmed: 194 App. Div. 957. | 113 | 184 |
| Hydraulic Power Co. v. Pettibone Cataract Paper Co.<br>Affirmed: 194 App. Div. 819. | 112 | 528 |
| Kinneary v. Parrett<br>Affirmed: 194 App. Div. 911. | 110 | 594 |


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| | VOL. | PAGE. |
|---|---|---|
| Levett v. Draper | 108 | 621 |
| Affirmed: 194 App. Div. 632. | | |
| Lezinsky Co., Inc., v. Hoffman | 111 | 415 |
| Affirmed: 194 App. Div. 954. | | |
| Matter of Barthelmess v. Cukor | 112 | 204 |
| Affirmed: 194 App. Div. 359. | | |
| Matter of Beckett | 112 | 45 |
| Affirmed: 194 App. Div. 901. | | |
| Matter of Caldwell | 107 | 316 |
| Affirmed: 195 App. Div. 890. | | |
| Matter of City of New York (Ely Ave.) | 88 | 320 |
| Reversed: 194 App. Div. 914. | | |
| Matter of Dollar | 103 | 137 |
| Affirmed: 194 App. Div. 948. | | |
| Matter of Early | 112 | 54 |
| Affirmed: 195 App. Div. 889. | | |
| Matter of Emerson v. Buck | 112 | 1 |
| Reversed: 230 N. Y. 380. | | |
| Matter of Frost | 107 | 118 |
| Reversed (sub nom. Matter of Kingsbury): 192 App. Div. 206; 230 N. Y. 580. | | |
| Matter of Lake | 112 | 681 |
| Affirmed: 194 App. Div. 967. | | |
| Matter of McDowell | 102 | 275 |
| Modified: 193 App. Div. 914; 230 N. Y. 601. | | |
| Matter of Scheibel | 108 | 551 |
| Reversed: 192 App. Div. 438; (sub nom. Matter of Scheibel v. O'Brien): 230 N. Y. 277. | | |
| Matter of Usatorres | 112 | 437 |
| Affirmed: 194 App. Div. 961. | | |
| Matter of Werlich | 107 | 207 |
| Affirmed: 230 N. Y. 516. | | |
| Mills v. Friedman | 111 | 253 |
| Affirmed: 194 App. Div. 942. | | |
| Mills v. McNamee | 111 | 253 |
| Affirmed: 194 App. Div. 932. | | |
| Morrell v. Brooklyn Borough Gas Co. No. 1 | 113 | 65 |
| Affirmed: 195 App. Div. 1. | | |
| Orton v. Tannenbaum | 110 | 128 |
| Reversed: 194 App. Div. 214. | | |


Digitized by Google

| | VOL. | PAGE. |
|---|---|---|
| Palmer-Marcy Lumber Co. v. Osband..... | 108 | 313 |
| Affirmed (sub nom. Palmer-Marcy Co., Inc. v. Gordon): 194 App. Div. 951. | | |
| People v. Willi..... | 109 | 79 |
| Affirmed: 194 App. Div. 946. | | |
| People ex rel. Brixton Operating Corp. v. La Fetra... | 113 | 527 |
| Affirmed: 194 App. Div. 523. | | |
| People ex rel. Brooklyn City R. R. Co. v. Pub. Serv. Comm. ..... | 110 | 509 |
| Affirmed (sub nom. People ex rel. Brooklyn City R. R. Co. v. Nixon): 193 App. Div. 746; 230 N. Y. 614. | | |
| People ex rel. Cassidy v. Lawes..... | 112 | 257 |
| Affirmed: 193 App. Div. 931; 230 N. Y. 553. | | |
| People ex rel. Cotton v. Leo..... | 110 | 519 |
| Modified and affirmed: 194 App. Div. 921. | | |
| People ex rel. Durham Realty Corp. v. La Fetra..... | 113 | 536 |
| Affirmed: 195 App. Div. 280; 230 N. Y. 429. | | |
| People ex rel. Facey v. Leo..... | 110 | 516 |
| Affirmed: 193 App. Div. 910; 230 N. Y. 602. | | |
| People ex rel. H. D. H. Realty Corp. v. Murphy..... | 113 | 253 |
| Reversed: 194 App. Div. 530; 230 N. Y. 654. | | |
| People ex rel. 176 West 87 St. Corp. v. Cantor..... | 107 | 6 |
| Affirmed: 191 App. Div. 946. Modified and affirmed: 230 N. Y. 312. | | |
| People ex rel. Post & McCord, Inc. v. Cantor..... | 108 | 632 |
| Affirmed on opinion below: 194 App. Div. 961. | | |
| People ex rel. Sabatino v. Jennings..... | 108 | 93 |
| Affirmed: 194 App. Div. 950. | | |
| Rosenwasser v. Rosenwasser..... | 110 | 38 |
| Affirmed: 194 App. Div. 916. | | |
| Rothbarth v. Herzfeld..... | 100 | 470 |
| Affirmed: 194 App. Div. 962. | | |
| Sherman v. Richmond Hose Co. No. 2..... | 101 | 62 |
| Modified and affirmed: 186 App. Div. 417; 230 N. Y. 462. | | |
| Shilman v. Shilman..... | 105 | 461 |
| Affirmed: 188 App. Div. 908; 230 N. Y. 554. | | |
| Spitzer v. Born, Incorporated..... | 111 | 595 |
| Reversed: 194 App. Div. 739. | | |


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| | VOL. | PAGE. |
|---|---|---|
| Staff v. Bemis Realty Corp..... | 111 | 635 |
| Affirmed: 194 App. Div. 635. | | |
| Stern & Co. v. Avedon & Co., Inc..... | 111 | 372 |
| Reversed: 194 App. Div. 433. | | |
| United States Mortgage & Trust Co. v. Liberty National Bank ..... | 112 | 149 |
| Affirmed: 195 App. Div. 890. | | |
| Wilmes v. Fournier ..... | 111 | 9 |
| Affirmed: 194 App. Div. 950. | | |


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# TABLE

OF

# CASES REPORTED.


A.

PAGE.

Adams v. Dodge..... 565
American Fruit Distributing Co., Berman, Inc., v..... 345
American Institute for Scientific Research, Greaves v. 413
American Union Line, Inc., Potter v. ..... 101
Astoria Light, H. & P. Co., People ex rel., v. Cantor. 419

B.

Bacon Coal Co., Block v... 54
Barnett, Inc., Bulova v.... 94
Barrett, Rittenberg v..... 167
Beau Site Co., Waters v... 65
Beekman, Gerard, Matter of. 73
Behrman, Kussold v..... 682
Berman, Inc., v. American Fruit Distributing Co.... 345
Bernstein, 17 & 19 East 95th St., Inc., v. ..... 513
Best v. State of New York. 272
Beth Israel, Matter of..... 582
Betz, People ex rel. Buffalo Consistory v. ..... 124
Block v. Bacon Coal Co.... 54
Boate v. Boate..... 321
Bodine, Owen v. ..... 142
Boenig, Dodd v. ..... 144
Brown, Kank Realty Co. v. 357
Bryant Co., People v..... 133
Buckley v. Sharpe..... 206
Buffalo Consistory, People ex rel. v. Betz..... 124

PAGE.

Bulova v. Barnett, Inc.... 94
Burgess Bros. Co., Inc., v. Stewart ..... 673
Burnham, Matilda E., Matter of ..... 455
Butler v. Sherwood..... 483
Byrne v. McDonough..... 529

C.

Canda, Louisa S., Matter of. 161
Cantor, People ex rel. Astoria Light, H. & P. Co. v. 419
Carroll v. Harris..... 392
Cash, Mary B., Matter of.. 641
Central Union Trust Co., Matter of ..... 214
Central Union Trust Co., Mehlhop v. ..... 464
Chemung Iron & Steel Co. v. Horn ..... 380
Childs Co., Inc., v. Reardon, Inc. ..... 178
City of Jamestown, Postal Telegraph Cable Co. v... 689
Clarke v. Eighth Avenue Railroad Co. ..... 707
Cleary, Riccobono v. ..... 174
Cocomitros, Jones v. ..... 447
Cohoes Power & Light Corp., Kavanaugh v. ..... 590
Coletti, Molloy v. ..... 177
Cooley v. State of New York ..... 717


Digitized by Google

PAGE.
Craig, People ex rel. Mullen Cont. Co., Inc., v. ..... 216
Cutler, Lillian Yongen, Matter of ..... 203

D.

Dale Engineering Co. v. State of New York..... 233
Danziger, 400 Manhattan Avenue Corp. v..... 79
Demme, Revillon v..... 1
De Orvananos, Hennenlotter v. ..... 333
Dermont, May v..... 106
Dietrich v. Palisades Interstate Park Comm....425, 429
Dodd v. Boenig..... 144
Dodge, Adams v..... 565
Duff, Michael, Matter of... 309

E.

Eclipse Light Co., Harris v. 399
Eighth Avenue Railroad Co., Clarke v..... 707
Einhorn, Harris v..... 387
Einstein, Henry L., Matter of ..... 452
Equitable Life Assurance Society, Isaacs v. ..... 468
Eygabroad, Kahrs v..... 395

F.

Falk v. Thurlow..... 586
Fitzsimmons, Annie, Matter of ..... 71
Flach, Michaels v..... 225
Fletcher v. Manhattan Life Ins. Co. ..... 409
Fox, John, Matter of..... 368
Fredenburg, David, Matter of ..... 299

G.

PAGE.
Gaffken, Arthur Henry, Matter of ..... 693
Garra, International Cheese Co. v. ..... 543
Gilchrist, People ex rel. Hultman v. ..... 651
Giordano, People v..... 62
Gitzelter v. Grossman..... 557
Goodwin, Nat C., Matter of. 39
Greaves v. American Institute for Scientific Research ..... 413
Grey, Jackson v..... 92
Grossman, Gitzelter v..... 557
Guaranty Trust Co. v. Meer. 327
Guida v. Pontrelli..... 181

H.

Haas, Northmann v..... 384
H. & K. Costume Co., Inc., v. Maison Bernard Importing Co., Inc..... 553
Harris, Carroll v..... 392
Harris v. Eclipse Light Co. 399
Harris v. Einhorn..... 387
Heinemann v. State of New York ..... 265
Hennenlotter v. De Orvananos ..... 333
Hillman, Skolny v..... 571
Horn, Chemung Iron & Steel Co. v..... 380
Hultman, People ex rel., v. Gilchrist . ..... 651
Hutchins, Woolley v..... 11

I.

International Cheese Co. v. Garra ..... 543
International Federation of Workers, Pre' Catelan, Inc., v. ..... 662

Digitized by Google

PAGE.

International Railway Co. v. Pickarski ..... 349
Irving National Bank, Wasserman v. ..... 704
Isaacs v. Equitable Life Assurance Society ..... 468

J.

Jackson v. Grey..... 92
Jones v. Cocomitros..... 447

K.

Kahrs v. Eygabroad..... 395
Kank Realty Co. v. Brown. 357
Kavanaugh v. Cohoes Power & Light Corp..... 590
Keith, A. Paul, Matter of.. 86
Kemmelick v. Kemmelick.. 198
Kibner v. State of New York ..... 444
Klingenbeck v. Young..... 121
Knott, Plymouth Rubber Co. v. ..... 695
Kolb, C. Gottlob, Matter of. 361
Konshner, Schubach v..... 354
Kuntzsch, Gustav H., Matter of ..... 694
Kupchick v. Levy..... 533
Kurlander Bros. & H. C. & S. Co., Potter v..... 117
Kussold v. Behrman..... 682

L.

Lee, Benjamin Franklin, Matter of ..... 511
Lehigh Valley Railroad Co., Loomis v. ..... 480
Lesser v. Lesser..... 701
Levy, Kupchick v..... 533
Lichtenberg, Benjamin, Matter of ..... 89
Lincoln, Lowell, Matter of. 45

PAGE.

Loew v. Ostreicher Bros... 404
Loomis v. Lehigh Valley Railroad Co. ..... 480

M.

McDonough, Byrne v..... 529
McGuire, Francis S., Matter of ..... 81
McMullen, Lena, Matter of. 505
McOwen, Ellen, Matter of.. 151
Madden v. Rosseter..... 416
Maison Bernard Importing Co., Inc., H. & K. Costume Co., Inc., v..... 553
Manhattan Life Ins. Co., Fletcher v. ..... 409
Martin, 507 Madison Ave. Realty Co., Inc., v..... 315
Matter of Beckman, Gerard 73
Matter of Beth Israel..... 582
Matter of Burnham, Matilda E. ..... 455
Matter of Canda, Louisa S. 161
Matter of Cash, Mary B.. 641
Matter of Central Union Trust Co. ..... 214
Matter of Cutler, Lillian Yongan ..... 203
Matter of Duff, Michael... 309
Matter of Einstein, Henry L. ..... 452
Matter of Fitzsimmons, Annie ..... 71
Matter of Fox, John..... 368
Matter of Fredenburg, David ..... 299
Matter of Gaffken, Arthur Henry ..... 693
Matter of Goodwin, Nat C. 39
Matter of Keith, A. Paul.. 86
Matter of Kolb, C. Gottlob. 361
Matter of Kuntzsch, Gustav H. ..... 694

Digitized by Google

PAGE.

Matter of Lee, Benjamin Franklin ..... 511
Matter of Lichtenberg, Benjamin ..... 89
Matter of Lincoln, Lowell.. 45
Matter of McGuire, Francis S. ..... 81
Matter of McMullen, Lena. 505
Matter of McOwen, Ellen.. 151
Matter of Metzger, Justine R. ..... 313
Matter of Miller, Ella J... 283
Matter of Mitchell, John A. 370
Matter of O'Connor v. Public Service Commission.. 337
Matter of Prime..... 720
Matter of Rowley, William S. ..... 375
Matter of Seeley..... 633
Matter of Shulenburg, John C. ..... 155
Matter of Sullard, George F. ..... 288
Matter of Tymeson, Eugene 643
May v. Dermont..... 106
Meer, Guaranty Trust Co. v. 327
Mehlhop v. Central Union Trust Co. ..... 464
Metzger, Justine R., Matter of ..... 313
Michaels v. Flach..... 225
Miller, Ella J., Matter of.. 283
Miller v. Walsh..... 430
Mitchell, John A., Matter of ..... 370
Model Building & Loan Assn. v. Reeves..... 137
Molloy v. Coletti..... 177
Mullen Cont. Co., Inc., People ex rel. v. Craig.. 216

N.

National City Bank, Slattery & Co. v..... 48
National Park Bank v. Old Colony Trust Co..... 127
Northmann v. Haas..... 384
Northway Holding Co., Inc., v. Parker ..... 57

O.

O'Connell v. Sugar Products Co. ..... 540
O'Connor, Matter of, v. Public Service Commission ..... 337
Old Colony Trust Co., National Park Bank v... 127
Ostreicher Bros., Loew v.. 404
Owen v. Bodine..... 142

P.

Palisades Interstate Park Comm., Dietrich v....425, 429
Parker, Northway Holding Co., Inc. v..... 57
Parucki v. Polish National Catholic Church ..... 6
Patane v. State of New York ..... 713
Payne, Sneddon v..... 537
People v. Bryant Co..... 133
People v. Giordano ..... 62
People v. Zittel..... 33
People ex rel. Astoria Light, H. & P. Co. v. Cantor... 419
People ex rel. Buffalo Consistory v. Betz..... 124
People ex rel. Hultman v. Gilchrist ..... 651
People ex rel. Mullen Cont. Co., Inc., v. Craig..... 216
Pfaudler v. Pfaudler Co... 477
Pfaudler Co., Pfaudler v... 477
Pickarski, International Railway Co. v..... 349
Plymouth Rubber Co. v. Knott ..... 695

Digitized by Google

PAGE.
Polish National Catholic Church, Parucki v..... 6
Pontrelli, Guida v..... 181
Postal Telegraph Cable Co. v. City of Jamestown... 689
Potter v. American Union Line, Inc. ..... 101
Potter v. Kurlander Bros. & H. C. & S. Co..... 117
Pre' Catelan, Inc., v. International Federation of Workers ..... 662
Prime, Matter of..... 720
Publicker Commercial Alcohol Co. v. Roberts..... 551
Public Service Commission, Matter of O'Connor v... 337

R.

Raporel S. S. Line, Inc., Starace & Co., Inc., v.. 111
Reardon, Inc., Childs Co., Inc., v..... 178
Reeves, Model Building & Loan Assn. v..... 137
Revillon v. Demme..... 1
Riccobono v. Cleary..... 174
Rittenberg v. Barrett..... 167
Roberts & Co., Inc., United States Cast Iron Pipe & Foundry Co. v..... 560
Roberts, Publicker Commercial Alcohol Co. v..... 551
Robinson v. State of New York ..... 708
Rosseter, Madden v..... 416
Rowley, William S., Matter of ..... 375
Rzepecka v. Urbanowski.. 30

S.

Schaefer v. Steuernagel.... 546
Schenck, Underhill v..... 520
Schubach v. Konshner..... 354
Seeley, Matter of..... 633
Sharpe, Buckley v..... 206
Sherlock v. State of New York ..... 491
Sherwood, Butler v..... 483
Shulenburg, John C., Matter of..... 155
Skolny v. Hillman..... 571
Slattery & Co. v. National City Bank ..... 48
Sneddon v. Payne..... 537
Spinx Holding Corp., Van Etten v. ..... 436
Starace & Co., Inc., v. Raporel S. S. Line, Inc.... 111
State of New York, Best v. 272
State of New York, Cooley v. ..... 717
State of New York, Dale Engineering Co. v..... 233
State of New York, Heinemann v..... 265
State of New York, Kibner v. ..... 444
State of New York, Patane v. ..... 713
State of New York, Robinson v..... 708
State of New York, Sherlock v..... 491
Steuernagel, Schaefer v.... 546
Stewart, Burgess Bros Co., Inc., v..... 673
Stockbridge, 163 East 36th Street Corp. v..... 98
Sturges v. Sturges..... 475
Sugar Products Co., O'Connell v..... 540
Sullard, George F., Matter of 288

T.

Taplinger & Co. v. Ward & Co. ..... 115
Thurlow, Falk v..... 586
Tobias Tile Co., Inc., v. Topping Realty Co., Inc. 500

Digitized by Google

PAGE.

Toohey, Wood Mowing & Reaping Machine Co. v.. 185
Topping Realty Co., Inc., Tobias Tile Co., Inc., v.. 500
Trainor, Weinman v..... 403
Tymeson, Eugene, Matter of 643

U.

Underhill v. Schenck..... 520
United States Cast Iron Pipe & Foundry Co. v. Roberts & Co., Inc..... 560
Urbanowski, Rzepecka v... 30

V.

Van Etten v. Spinx Holding Corp. ..... 436

W.

Walsh, Miller v..... 430
Ward & Co., Taplinger & Co. v..... 115
Wasserman v. Irving National Bank ..... 704
Waters v. Beau Site Co.... 65
Weinman v. Trainor..... 403
Wood Mowing & Reaping Machine Co. v. Toohey.. 185
Woolley v. Hutchins..... 11

Y.

Young, Klingenbeck v..... 121

Z.

Zittel, People v..... 33

17 & 19 East 95th St., Inc., v. Bernstein ..... 513
163 East 36th Street Corp. v. Stockbridge ..... 98
400 Manhattan Avenue Corp. v. Danziger..... 79
507 Madison Ave. Realty Co., Inc., v. Martin..... 315

Digitized by Google

# TABLE OF CASES CITED.

## A.


| | | PAGE. |
|---|---|---|
| Abbott v. Draper | 4 Den. 51 | 549 |
| Abramowitz v. Gray | 50 Misc. Rep. 639 | 559 |
| Adams v. Cordis | 8 Pick. 260 | 4 |
| Adams v. Massey | 184 N. Y. 62 | 304 |
| Alcock v. Hopkins | 6 Cush. 484 | 4 |
| Aldridge v. Aldridge | 202 Mo. 565 | 487 |
| Allen v. Allen | 149 N. Y. 280 | 28 |
| Allen v. German-American Insurance Co | 123 N. Y. 6 | 473 |
| Alsens A. P. C. Works v. Degnon Contracting Co | 222 N. Y. 34 | 288 |
| Ament v. Schubert Piano Co | 172 App. Div. 423 | 402 |
| American Bank Note Co. v. State of New York | 64 Ap. Div. 223, 227 | 249 |
| American Grocer Pub. Assn. v. Grocer Pub. Co | 51 How. Pr. 402, 403 | 525 |
| American Malting Co. v. Keitel | 209 Fed. Repr. 351, 358 | 183 |
| American Washboard Co. v. Saginaw Co | 103 Fed. Repr. 281, 285 | 656 |
| Ames v. Manhattan Life Ins. Co. | 40 App. Div. 465; affd., 167 N. Y. 584 | 473 |
| Amoskeag Mfg. Co. v. Spear | 2 Sandf. 599, 605, 606 | 656 |
| Amsink v. Rogers | 189 N. Y. 252 | 334, 335 |
| Anderson v. Hicks | 150 App. Div. 289, 293 | 200, 201 |
| Arnold v. State of New York | 163 App. Div. 253, 261 | 498, 500 |
| Asche v. Asche | 113 N. Y. 322 | 28 |
| Ashley v. Dixon | 48 N. Y. 430 | 182 |
| Atchison, T. & S. F. Ry. Co. v. Gee | 139 Fed. Repr. 582, 584 | 189, 671 |
| Atlantic & Pacific R. R. Company v. Laird | 164 U. S. 393 | 427 |
| Automobile Ins. Co. v. Guaranty Securities Corporation | 240 Fed. Repr. 222, 225 | 183 |
| Avery v. Willson | 81 N. Y. 341 | 390 |




Digitized by Google

## B.


| | | PAGE. |
|---|---|---|
| Bacon v. Dinsmore | 42 How. Pr. 368 | 172 |
| Baker v. Nat. Exchange Bank | 100 N. Y. 31 | 699 |
| Banks v. Mayor | 7 Wall. 16 | 421 |
| Banzer v. Banzer | 156 N. Y. 429 | 304 |
| Barnes v. Chicago Typo. Union | 232 Ill. 402 | 671 |
| Barnes v. Stern Bros | 89 Misc. Rep 385 | 70 |
| Barto v. Himrod | 4 Seld. 483 | 244 |
| Bauer v. State of New York | 106 Misc. Rep. 1 | 709 |
| Beck v. Railway Teamsters Union | 118 Mich. 497 | 671 |
| Bedlow v. New York Floating Dry Dock Co | 112 N. Y. 262, 283 | 625 |
| Beers v. New York Life Ins. Co. | 66 Hun, 75 | 415 |
| Bell v. Chapman | 10 Johns. 183 | 695 |
| Benedict v. Webb | 98 N. Y. 460 | 28 |
| Bennett v. Byrne | 2 Barb. Ch. 216, 219 | 85 |
| Bernard v. United Life Ins. Assn. | 17 Misc. Rep. 115 | 474 |
| Birngruber v. Town of Eastchester | 54 App. Div. 80 | 446 |
| Blackstone v. Miller | 188 U. S. 189, 204 | 164 |
| Blake v. Barnes | 9 N. Y. Supp. 933; 30 N. Y. St. Repr. 299 | 409 |
| Blodgett v. Webster | 24 N. H. 91 | 54 |
| Bodine v. Exchange Fire Ins. Co. | 51 N. Y. 117, 122, 123 | 472, 473, 474 |
| Boon v. Castle | 61 Misc. Rep. 474 | 486 |
| Booth v. Baptist Church | 126 N. Y. 215 | 25 |
| Booth v. Burgess | 72 N. J. Eq. 181, 188 | 183 |
| Borden v. N. Y. C. R. R. Co | 98 Misc. Rep. 574 | 68 |
| Boucicault v. Boucicault | 21 Hun, 431 | 476 |
| Bowen v. State of New York | 108 N Y. 166 | 499 |
| Boyd v. United States Mortgage & Trust Co | 187 N. Y. 262 | 576 |
| Bradt v. Church | 110 N. Y. 537 | 621 |
| Brady v. Cassidy | 145 N. Y. 171 | 390 |
| Brede v. Rosedale Terrace Co | 216 N. Y. 246 | 384 |
| Brewer v. Brewer | 11 Hun, 147; affd., 72 N. Y. 603 | 28 |
| Brewster v. Van Ness | 18 Johns. 133 | 209, 210 |
| Briggs v. Partridge | 64 N. Y. 357, 362 | 531, 533 |


Digitized by Google

| | | PAGE. |
|---|---|---|
| Brinkerhoff v. Seabury..... | 137 App. Div. 916; aff'd., 201 N. Y. 559.....22, | 26 |
| Brinkley v. Walcott..... | 10 Heisk. (Tenn.) 22..... | 516 |
| Britton v. Ferrin..... | 171 N. Y. 235..... | 699 |
| Brooks v. Dinsmore..... | 15 Daly, 428..... | 172 |
| Brown v. Cody..... | 23 App. Div. 210..... | 567 |
| Brown v. N. Y. C. R. R. Co.... | 44 N. Y. 79..... | 357 |
| Bruder v. Crafts & D'Amora Co. | 79 Misc. Rep. 88..... | 318 |
| Bryan v. McGurk..... | 200 N. Y. 332..... | 149 |
| Bryson v. St. Helen..... | 79 Hun, 167..... | 443 |
| Buckmaster v. Thompson..... | 36 N. Y. 558..... | 357 |
| Bullen v. State of Wisconsin... | 240 U. S. 625..... | 164 |
| Bulova v. Barnett, Inc..... | 111 Misc. Rep. 150; 193 App. Div. 161..... | 93 |
| Burgess v. Alliance Ins. Co..... | 10 Allen, 221..... | 4 |
| Burgess v. Burgess..... | 3 De Gex, M. & G. 896.... | 479 |
| Burke v. State of New York... | 64 Misc. Rep. 558..... | 499 |
| Burks v. State of New York.... | 13 Court of Claims, 153.499, | 500 |
| Burn v. Phelps..... | 1 Stark. 94..... | 542 |
| Burrow v. Marceau..... | 124 App. Div. 665, 669.... | 479 |
| Burt v. Dutcher..... | 34 N. Y. 493..... | 700 |
| Bush v. Prosser..... | 11 N. Y. 347, 352..... | 567 |
| Bushnell v. Bushnell..... | 15 Barb. 399..... | 476 |


## C.


| | | |
|---|---|---|
| Campbell v. Beaumont..... | 91 N. Y. 464..... | 304 |
| Canda v. Totten..... | 157 N. Y. 281.....411, | 412 |
| Carney v. New York Life Ins. Co. ..... | 162 N. Y. 453..... | 415 |
| Carow v. Mowatt ..... | 2 Edw. Ch. 56..... | 298 |
| Carpenter v. Newland..... | 92 Misc. Rep. 596..... | 230 |
| Carpenter v. State..... | 39 Wis. 271..... | 241 |
| Carr v. Ellison..... | 20 Wend. 177..... | 451 |
| Casco Bank v. Keene..... | 53 Maine, 103..... | 54 |
| Case v. Case..... | 203 N. Y. 263..... | 531 |
| Casper v. Kuhne..... | 79 Misc. Rep. 411..... | 335 |
| Cass v. Realty Securities Co... | 148 App. Div. 96, 100..... | 509 |
| Cave v. Osborne..... | 193 Mass. 482..... | 550 |
| Cayuga County v. State of New York ..... | 153 N. Y. 279.....247, | 250 |
| Cazzani v. Title Guar. & Trust Co. ..... | 175 App. Div. 369; aff'd., 220 N. Y. 683..... | 512 |
| Central Bank of Troy v. Heydorn ..... | 48 N. Y. 260.....620, 622, | 623 |


Digitized by Google

| | | PAGE. |
|---|---|---|
| Chamberlain v. Taylor..... | 105 N. Y. 184–194..... | 28 |
| Chapman v. Forbes..... | 123 N. Y. 532, 538..... | 442 |
| Chastain v. Tilford..... | 201 N. Y. 338..... | 22 |
| Childs Co. v. Burke..... | 110 Misc. Rep. 103..... | 319 |
| Church v. LaFayette Fire Ins. Co. ..... | 66 N. Y. 222..... | 475 |
| Church v. Shultes..... | 4 App. Div. 378..... | 622 |
| City of Geneva v. Henson..... | 195 N. Y. 447.....433, | 434 |
| City Trust, Safe Deposit & Surety Co. v. American Brewing Co..... | 182 N. Y. 285..... | 531 |
| Clarage v. Luphringer..... | 202 Mich. 612..... | 671 |
| Clarke v. Leupp..... | 88 N. Y. 228..... | 304 |
| Clark v. Fosdick..... | 118 N. Y. 7.....322, | 323 |
| Clark v. West..... | 193 N. Y. 349..... | 288 |
| Clason v. Baldwin..... | 152 N. Y. 210..... | 150 |
| Clay v. Wood..... | 153 N. Y. 134.....304, | 305 |
| Clift v. Moses..... | 116 N. Y. 144, 158..... | 296 |
| Cluett v. Couture..... | 140 App. Div. 830..... | 53 |
| Cochrane v. Schell..... | 140 N. Y. 516..... | 25 |
| Coddington v. Larner..... | 75 App. Div. 293, 532..200, | 201 |
| Cohen v. Teller..... | 93 Penn. St. 123..... | 54 |
| Cole v. State of New York.... | 102 N. Y. 46, 48, 51, 52, 59.....245, 246, 250, | 254 |
| Collier v. Coates..... | 17 Barb. 471..... | 549 |
| Collins v. Hasbrouck..... | 56 N. Y. 157..... | 541 |
| Columbus Ry. Power & Light Co. v. City of Columbus.... | 249 U. S. 399....235, 255, | 256 |
| Commercial National Bank v. Heilbronner ..... | 108 N. Y. 439..... | 699 |
| Commonwealth v. Haupt..... | 10 Allen, 38..... | 4 |
| Conaughty v. Nichols..... | 42 N. Y. 83..... | 567 |
| Coney v. Town of Gilboa..... | 55 App. Div. 111..... | 280 |
| Congregation Kehal Adath v. Universal Building & Construction Co..... | 134 App. Div. 368, 370.411, | 412 |
| Connoss v. Meir..... | 2 E. D. Smith, 314..... | 567 |
| Conrow v. Little..... | 115 N. Y. 394..... | 516 |
| Converseville Co. v. Chambersburg Woolen Co..... | 14 Hun, 509..... | 700 |
| Coope v. Lowerre..... | 1 Barb. Ch. 45..... | 155 |
| Cornwall v. Cornwall..... | 1 Dem. 1..... | 459 |
| Cortland County v. Herkimer County ..... | 44 N. Y. 26..... | 397 |


Digitized by Google

| | | PAGE. |
|---|---|---|
| Corwith First State Bank v. Williams | 143 Iowa, 177 | 54 |
| Covell v. Weston | 20 Johns. 414 | 297 |
| Cowenhoven v. Ball | 118 N. Y. 234 | 286 |
| Crackanthorpe v. Sickles | 156 App. Div. 753 | 165 |
| Crain v. Cavana | 36 Barb. 410 | 160 |
| Crandall v. Shaw | 2 Redf. 100 | 459, 462 |
| Crayton v. Larabee | 220 N. Y. 493 | 639 |
| Cronin v. Manhattan Transit Co. | 124 App. Div. 543 | 55, 56 |
| Cruger v. McLaury | 41 N. Y. 219 | 619 |
| Cruikshank v. Goodwin | 20 N. Y. Supp. 757 | 353 |
| Cunard v. Francklyn | 111 N. Y. 511 | 568 |
| Cunningham v. Pattee | 99 Mass. 248 | 451 |
| Curran v. Galen | 152 N. Y. 33–37 | 670 |
| Cutter v. Gudebrod Bros. Co. | 36 App. Div. 362; 46 App. Div. 605; affd., 168 N. Y. 512 | 479, 480 |

D.

| | | |
|---|---|---|
| Dale v. Guaranty Trust Co. | 168 App. Div. 601 | 512 |
| Daly v. Cornwell | 34 App. Div. 27 | 182 |
| Daly v. Wolaneck | 29 Misc. Rep. 162 | 408 |
| Dana v. Murray | 122 N. Y. 604 | 28 |
| Davis v. Davis | 75 N. Y. 221 | 701, 703 |
| Davis v. Grand Rapids Fire Ins. Co. | 7 App. Div. 403, 405 | 692 |
| Davis v. MacMahon | 161 App. Div. 458; affd., 214 N. Y. 614 | 25 |
| Davis v. Solomon | 25 Misc. Rep. 695 | 353 |
| Davis v. Zimmerman | 91 Hun, 492 | 581 |
| Day v. United States | 245 U. S. 159 | 256 |
| Deeves & Sons v. Manhattan Life Ins. Co | 195 N. Y. 324 | 390 |
| DeJong v. Behrman Co | 148 App. Div. 37 | 182 |
| Delafield v. Shipman | 103 N. Y. 463 | 25 |
| Delage v. Normandeau | 9 Queb. Q. B. 93 | 183 |
| Denton v. Denton | 1 Johns. Ch. 365, 441 | 476 |
| DePeyster v. Michael | 6 N. Y. 467 | 616 |
| Despard v. Walbridge | 15 N. Y. 375 | 515 |
| Devisees of Van Rensselaer v. Executor of Platner | 2 Johns. Cas. 26 | 616 |
| Dexheimer v. Gautier | 34 How. Pr. 471 | 489 |
| Dexter v. Norton | 47 N. Y. 62–65 | 326 |
| Dickey v. Mutual Film Corp | 160 N. Y. Supp. 609 | 524 |


Digitized by Google

| | | PAGE. |
|---|---|---|
| Dillon v. Anderson | 43 N. Y. 236 | 398 |
| DiMarco v. State of New York | 110 Misc. Rep. 426 | 428 |
| Dodge v. Cornelius | 168 N. Y. 242 | 65 |
| Doran v. Chase | 2 Wkly. Notes (Pa.) 609 | 542 |
| Dorrer v. Town of Callicoon | 183 App. Div. 186 | 280 |
| Doud v. Huntington Hebrew Congregation | 178 App. Div. 748 | 148 |
| Dougherty v. Thompson | 167 N. Y. 472 | 25 |
| Dowling v. Hastings | 211 N. Y. 202 | 352 |
| Drake v. New York Suburban Water Co | 36 App. Div. 275 | 442 |
| Drake v. Seaman | 97 N. Y. 230 | 357 |
| Draper v. Oswego County F. R. Assn. | 190 N. Y. 12, 16 | 286 |
| Duff v. Rodenkirchen | 110 Misc. Rep. 575; affd., 193 App. Div. 898 | 311 |
| Duncan v. Jones | 32 Hun, 12 | 173 |
| Duplex Printing Press Co. v. Deering | U. S. Supreme Court Advance Opinions, February 1, 1921, p. 176 | 678 |
| Dwight v. Germania Life Ins. Co. | 84 N. Y. 493, 506..568, 569, | 570 |
| Dworsky v. Arndtstein | 29 App. Div. 274 | 160 |
| Dwyer v. Slattery | 118 App. Div. 345 | 570 |
| Dykers v. Townsend | 24 N. Y. 57.....531, | 533 |


## E.


| | | |
|---|---|---|
| Educational Films Corp. v. Lincoln & P. Co., Inc | 192 App. Div. 621 | 169 |
| Ehrgott v. City of New York | 96 N. Y. 264, 277 | 568 |
| Elliott v. Kennedy | 26 How. Pr. 422 | 376 |
| Eppens, Smith & Weimann Co. v. Littlejohn | 164 N. Y. 187 | 382 |
| Equitable Trust Co. v. Keene | 111 Misc. Rep. 544 | 329 |
| Erie R. R. Co. v. City of Buffalo | 180 N. Y. 197 | 9 |
| Evans v. Evans | 69 Misc. Rep. 86 | 486 |
| Ex parte Willocks | 7 Cow. 402 | 9 |


## F.


| | | |
|---|---|---|
| Fair v. Kenny | 103 Misc. Rep. 412 | 376 |
| Farenholtz v. Meinshausen | 181 App. Div. 474 | 695 |
| Fargo v. McVicker | 55 Barb. 437 | 172 |


Digitized by Google

| | | PAGE. |
|---|---|---|
| Farmers Loan & Trust Co. v. Kip | 192 N. Y. 266, 278 | 167 |
| Fay v. Marx | 2 Bradbury Pl. & Pr. 81 | 408 |
| Fealy v. Bull | 11 App. Div. 468 | 402 |
| Fearon v. Earl of Aylesford | 14 Q. B. Div. 792 | 323 |
| Ferguson v. Crawford | 70 N. Y. 253 | 377 |
| Ferguson v. Town of Lewisboro | 213 N. Y. 141 | 446 |
| Fero v. Fero | 62 App. Div. 470 | 201 |
| Fink v. Wallach | 47 Misc. Rep. 242 | 376 |
| Finnegan v. McGuffog | 139 App. Div. 899; affd., 203 N. Y. 342 | 140 |
| First Construction Co. v. State of New York | 221 N. Y. 295 | 434 |
| First National Bank v. American Exch. Nat. Bank | 49 App. Div. 349; affd., 170 N. Y. 88 | 53 |
| Fisher v. Corwin | 35 Hun, 253 | 692 |
| Fitzsimmons v. City of Brooklyn | 102 N. Y. 538 | 271 |
| Flansburg v. Town of Elbridge | 205 N. Y. 423 | 279 |
| Fleischman v. Furgueson | 223 N. Y. 235 | 606 |
| Fleischman v. Plock | 19 Misc. Rep. 649 | 549 |
| Fogg v. Edwards | 57 How. Pr. 200 | 504 |
| Foose v. Whitmore | 82 N. Y. 405 | 305 |
| Forster v. Kane | 1 Dem. 67 | 462 |
| Foshay v. Robinson | 137 N. Y. 134 | 441 |
| Foster v. Retail Clerks' Protective Assn | 39 Misc. Rep. 48, 57 | 189 |
| Fox v. Hawkins | 150 App. Div. 801 | 532 |
| Francklyn v. Sprague | 10 Hun, 589 | 700 |
| Frank v. Morewood Realty Holding Co | 89 Misc. Rep. 425 | 100 |
| Fraves v. American Exchange Bank | 17 N. Y. 205 | 51 |
| Freeholders v. Strader | 18 N. J. Law, 108 | 429 |
| French v. Dauchy | 134 N. Y. 543 | 297 |
| Frey & Son, Inc. v. Sherburne Co. | 193 App. Div. 849 | 132 |
| Frohman v. Fitch | 164 App. Div. 231 | 523 |
| Fry v. Bennett | 5 Sand. 54 | 567 |
| Fullerton v. Gaylord | 30 N. Y. Sup. Ct. 551, 557 | 568 |
| Fulton Light, H. & P. Co. v. State of New York | 200 N. Y. 400 | 436 |


Digitized by Google

## G.


| | | PAGE. |
|---|---|---|
| Gabrielson v. Waydell | 135 N. Y. 1 | 589 |
| Galusha v. Galusha | 116 N. Y. 635.....322, 323, | 324 |
| Ganson v. Tifft | 71 N. Y. 54 | 541 |
| Gardiner v. Gardiner | 3 Abb. N. C. 1 | 476 |
| Garvey v. McDevitt | 72 N. Y. 556 | 28 |
| Gass v. Souther | 46 App. Div. 256; affd., 167 N. Y. 604 | 441 |
| Gay v. Ulrichs | 136 App. Div. 809 | 347 |
| Gee v. Chase Mfg. Co | 12 Hun, 630 | 568 |
| General Baking Co. v. Daniell | 181 App. Div. 501 | 59 |
| George Jonas Glass Co. v. Glass Bottle Blowers Assn. of U. S. & Canada | 72 N. J. Eq. 653; affd., 77 id. 219 | 671 |
| Gluckman v. Darling | 85 N. J. L. 457 | 54 |
| Goldfelder v. Greenberg | 189 App. Div. 184 | 55 |
| Goldstein v. Pullman Co | 220 N. Y. 549, 552, 553 | 539 |
| Goodman v. Alexander | 165 N. Y. 289 | 232 |
| Goodwin v. Coddington | 154 N. Y. 283, 286 | 304 |
| Goodyear Tire & Rubber Co. v. Vulcanized Products Co | 228 N. Y. 118, 125 | 390 |
| Gotthelf v. Krulewitch | 153 App. Div. 746 | 351 |
| Gourley v. Linsenbigler | 51 Penn. St. 345 | 489 |
| Grafton v. Cummings | 99 U. S. 100 | 532 |
| Graham v. Healy | 154 App. Div. 76 | 549 |
| Graham v. Van Wyck | 14 Barb. 531 | 160 |
| Grant v. Healy | 10 Fed. Cas. 978 | 4 |
| Greenland v. Waddell | 116 N. Y. 234, 240 | 72 |
| Griffin v. Kinsley | 75 Ill. 411 | 516 |
| Griswold v. Haven | 25 N. Y. 595 | 138 |
| Groat v. Gile | 51 N. Y. 442 | 700 |
| Grymes v. Hone | 49 N. Y. 17 | 488 |
| Guiteman v. Davis | 45 Barb. 576 | 4 |
| Guttag v. Shatzkin | 194 App. Div. 509 | 517 |


## H.


| | | |
|---|---|---|
| Haddock v. Haddock | 201 U. S. 562 | 130 |
| Hadfield v. Colter | 188 App. Div. 563 | 391 |
| Haffey v. Lynch | 143 N. Y. 241.....687, | 688 |
| Hagar v. Clark | 78 N. Y. 45 | 102 |
| Hager v. Henneberger | 83 Misc. Rep. 417 | 532 |


Digitized by Google

| | | PAGE. |
|---|---|---|
| Haight v. Brisbin | 100 N. Y. 219 | 297 |
| Hampton & B. R. & Lumber Co. v. Sizer | 31 Misc. Rep. 499 | 700 |
| Harbeck v. Vanderbilt | 20 N. Y. 395, 397 | 351, 352 |
| Harriott v. Plimpton | 166 Mass. 585 | 183 |
| Hartford v. Greenwich Bank | 157 App. Div. 448 | 53 |
| Hasbrouck v. New York Central & H. R. R. R. Co | 202 N. Y. 363 | 68, 539 |
| Hascall v. King | 162 N. Y. 134 | 22 |
| Hauselt v. Patterson | 124 N. Y. 349 | 297 |
| Hawkins v. Union Trust Co | 187 App. Div. 472 | 44 |
| Haynes v. Aldrich | 133 N. Y. 287 | 515 |
| Haynes v. Sherman | 117 N. Y. 433 | 20, 28 |
| Heavey v. Commercial National Bank | 27 Utah, 222 | 52, 53 |
| Heffner v. Dawson | 63 Ill. 403 | 54 |
| Heitkamper v. Hoffmann | 99 Misc. Rep. 543-546 | 580 |
| Heller v. Levinson | 166 App. Div. 673 | 377 |
| Helling v. Boss | 121 N. Y. Supp. 1013 | 577 |
| Hendricks v. Isaacs | 117 N. Y. 411 | 159 |
| Hennessy v. Patterson | 85 N. Y. 91 | 25 |
| Heuman v. Powers Co | 226 N. Y. 205 | 69 |
| Hibernia National Bank v. Lacombe | 84 N. Y. 367 | 335 |
| Hibernia Savings & Loan Society v. San Francisco | 72 Pac. Repr. 920; affd., 200 U. S. 310 | 422 |
| Higgins Co. v. Higgins Soap Co. | 144 N. Y. 462, 468 | 479 |
| Hill v. Moore | 131 App. Div. 365 | 296 |
| Hitchman Coal & Coke Co. v. Mitchell | 245 U. S. 229 | 577, 578 |
| Hobson v. Hale | 95 N. Y. 588, 607 | 13, 28 |
| Holbrook v. Nesbitt | 163 Mass. 120, 125 | 656 |
| Holland-Dale Garden Company, Inc. v. State of New York | 113 Misc. Rep. 219 | 709 |
| Holley v. Chamberlain | 1 Redf. 333 | 83 |
| Holmes v. North German Lloyd S. S. Co | 184 N. Y. 280 | 539 |
| Holthausen v. Kells | 18 App. Div. 80 | 294 |
| Hone's Exrs. v. Van Schaick | 20 Wend. 564 | 20 |
| Hood v. Hood | 85 N. Y. 561 | 297 |
| Hosford v. Ballard | 39 N. Y. 147 | 618 |
| Hostetter v. Park | 137 N. Y. 30 | 395 |
| Howard v. Dougherty | 3 Redf. 535 | 459 |


Digitized by Google

| | | PAGE. |
|---|---|---|
| Hubbell v. Yonkers | 104 N. Y. 434 | 282 |
| Hungarian General Credit Bank v. Titus | 182 App. Div. 826 | 695 |
| Hunt v. Bailey | 39 Mo. 257 | 515, 516 |

I.

| | | |
|---|---|---|
| Imperator Realty Co. v. Tull | 228 N. Y. 447 | 320 |
| Internoscia v. Bonelli | 28 Queb. Super. 58 | 183 |
| Irish v. Nutting | 47 Barb. 370, 385, 387 | 487, 489 |
| Iron Mountain, etc., Rd. v. Johnson | 119 U. S. 608, 611 | 32 |
| Israel v. Israel | 38 Misc. Rep. 335, 338 | 83 |
| Ives v. South Buffalo Railway Co. | 201 N. Y. 271, 311 | 588 |

J.

| | | |
|---|---|---|
| Jackson v. Chase | 15 Johns. 354 | 692 |
| Jackson v. Collins | 11 Johns. 1 | 616 |
| Jackson v. Decker | 11 Johns. 418 | 695 |
| John A. Roebling's Sons Co. of N. Y. v. Erickson | 261 Fed. Repr. 986 | 589 |
| Johnson v. Phoenix Bridge Co. | 197 N. Y. 316 | 576 |
| Johnson v. Standard Transportation Co | 188 App. Div. 934 | 589 |
| Johnston v. Donvan | 106 N. Y. 269 | 440 |
| Jones v. Hamersley | 2 Dem. 286 | 459 |

K.

| | | |
|---|---|---|
| Kahlen v. State of New York | 223 N. Y. 383 | 434 |
| Kalem v. Harper Bros | 222 U. S. 55 | 526 |
| Kalish v. Kalish | 166 N. Y. 368 | 22 |
| Kammerrer v. Ziegler | 1 Dem. 177 | 294 |
| Karsch v. Pottier & S. Mfg. & Imp. Co. | 82 App. Div. 230, 233 | 10 |
| Kenney v. State of New York | 222 U. S. 525 | 365 |
| Kelley v. St. Michaels R. C. Church | 148 App. Div. 707 | 10 |
| Kellogg v. Sowerby | 190 N. Y. 370 | 677 |
| Kelly v. Metropolitan Railway Company (1895) | 1 Q. B. 944 | 427 |
| Kelly v. Sheehy | 60 How. Pr. 439 | 33 |
| Kennedy v. City of New York | 196 N. Y. 19, 23 | 515 |
| Kentucky Distilleries, etc., v. Wathen | 110 Fed. Repr. 641, 645 | 656 |


Digitized by Google

| | | PAGE. |
|---|---|---|
| Kershaw v. Kelsey | 100 Mass. 561 | 695 |
| Kiernan v. The Dutchess County Mutual Insurance Co | 150 N. Y. 190 | 286 |
| Killie v. Dannert | 232 Fed. Repr. 104 | 351 |
| King v. Hudson River Realty Co. | 210 N. Y. 467 | 320 |
| King v. Village of Fort Ann | 180 N. Y. 496 | 279 |
| Klein v. Beach | 239 Fed. Repr. 108; 232 id. 240 | 523 |
| Klein v. Mechanics & Traders Bank | 145 App. Div. 617 | 532 |
| Knarston v. Manhattan Life Ins. Co. | 140 Cal. 57 | 287 |
| Knox v. Jones | 47 N. Y. 389 | 25, 26 |
| Knudsen v. Benn | 123 Fed. Repr. 636 | 671 |
| Kopelman v. Gritman | 76 Misc. Rep. 188 | 100 |
| Korn v. Lipman | 201 N. Y. 404 | 347 |
| Krim Realty Corporation v. Varvori | 97 Misc. Rep. 407 | 319 |
| Kromer v. Heim | 75 N. Y. 574 | 120 |
| Kunkel v. MacGill | 56 Md. 120 | 374 |
| Kuriger v. Joest | 22 Ind. App. 633 | 54 |


## L.


| | | |
|---|---|---|
| Ladd v. Arkell | 50 N. Y. Super. Ct. 150, 155 | 4 |
| Laffey v. Kaufman | 134 Cal. 391 | 550 |
| Lane v. Town of Hancock | 142 N. Y. 510 | 280, 282 |
| Langdon v. New York, L. E. & W. R. Co | 15 N. Y. Supp. 255 | 483 |
| Langstroth v. Turner Cypress Lumber Co. | 162 App. Div. 818, 823; affd., 220 N. Y. 706 | 531, 533 |
| Larkin v. Watson Wagon Co | 68 App. Div. 86 | 61 |
| Lasher v. Heist | 126 Ill. App. 82 | 515 |
| Lawrence v. Cooke | 104 N. Y. 632 | 305 |
| Lawrence v. Ely | 38 N. Y. 42 | 692 |
| Lawrence v. French | 25 Wend. 443 | 542 |
| Lawrence v. Lawrence | 32 Misc. Rep. 503; 172 N. Y. Supp. 146 | 160, 578 |
| Lawrence v. Littlefield | 215 N. Y. 561 | 91 |
| Leaver v. Gauss | 62 Iowa, 314 | 486 |
| Ledwith v. Ledwith | 1 Dem. 154 | 82 |
| Legal Tender Case | 110 U. S. 421, 444; 4 Sup. Ct. 122, 28 L. Ed. 204 | 423 |


Digitized by Google

| | | PAGE. |
|---|---|---|
| Lehigh Valley R. R. Co. v. Canal Board | 204 N. Y. 471 | 250, 253 |
| Lent v. Howard | 89 N. Y. 169 | 72 |
| Leonard v. Leonard | 145 Mich. 563 | 486 |
| Leonard v. Whitson | 34 Ind. App. 383 | 183 |
| Leone v. Booth Steamship Co., Ltd. | 189 App. Div. 185 | 589 |
| Levy v. Walker | 10 Ch. D. 436, 448 | 656 |
| Lewis v. Whitnell | 21 Ky. 190 | 550 |
| Light v. Light | 124 App. Div. 567 | 702 |
| Linton v. Unexcelled Fireworks Co. | 124 N. Y. 533 | 567 |
| Locke v. State of New York | 140 N. Y. 480, 481 | 428 |
| Lodge v. Spooner | 8 Gray, 166 | 4 |
| Loomis v. Lehigh Valley R. R. Co. | 208 N. Y. 312; 240 U. S. 43. | 482 |
| Loomis v. Semper | 38 Misc. Rep. 570 | 147 |
| Losee v. Buchanan | 51 N. Y. 476, 484 | 359 |
| Lusk v. Hastings | 1 Hill, 656 | 353 |
| Lyon v. Board of Supervisors | 115 App. Div. 193 | 640 |
| Lyon v. Odell | 65 N. Y. 28 | 621, 622 |


## M.


| | | |
|---|---|---|
| McClellard v. Mutual Life Ins. Co. | 217 N. Y. 336, 346 *et seq.* | 473 |
| McCulloch v. Maryland | 4 Wheat. 316, 4 L. Ed. 579. | 422 |
| McDowell v. Starobin El. Supply Co. | 190 App. Div. 676 | 391 |
| McGarry v. City of Buffalo | 53 N. Y. St. Repr. 882 | 402 |
| McGuffin v. Dinsmore | 4 Abb. N. C. 241 | 171 |
| Machson v. Katz | N. Y. L. J., Jan. 11, 1921. | 515, 519 |
| Mackall v. Olcott | 93 App. Div. 282 | 412 |
| Madison Ave. Baptist v. Baptist Church in Oliver St. | 46 N. Y. 131 | 583 |
| Magnin v. Dinsmore | 62 N. Y. 35, 44 | 70 |
| Main v. Feathers | 21 Barb. 646 | 616 |
| Manners v. Morosco | 252 U. S. 317-325, 326 | 528 |
| Manners v. Triangle Film Corp. | 247 Fed. Repr. 301, 303 | 524 |
| Mariani Bros., Inc., v. Wilson, Sons & Co., Ltd. | 188 App. Div. 617 | 112, 113 |
| Marine v. Jauncey | 1 Barb. 486 | 700 |
| Marks v. Townsend | 97 N. Y. 590 | 407 |
| Martin v. Franklin | 4 Johns. 124 | 4, 5 |


Digitized by Google

| | | PAGE. |
|---|---|---|
| Martin v. New York Life Ins. Co. | 148 N. Y. 117 | 269 |
| Mast, Foos & Co. v. Stover | 177 U. S. 485 | 131 |
| Matsell v. Flanagan | 2 Abb. Pr. (N. S.) 459, 461. | 525 |
| Matter of Albany R. R. Co | 64 App. Div. 257; 170 N. Y. 619 | 254 |
| Matter of Altman | 87 Misc. Rep. 255, 260 | 76 |
| Matter of Ammarell | 38 Misc. Rep. 399 | 41 |
| Matter of Archer | 51 Misc. Rep. 260 | 42 |
| Matter of Arrowsmith | 162 App. Div. 623 | 369 |
| Matter of Austin | 109 Misc. Rep. 584 | 366 |
| Matter of Barbour | 185 App. Div. 445, 454 | 507<br>509 |
| Matter of Bentley | 31 Misc. Rep. 656 | 363 |
| Matter of Berry | 154 App. Div. 509; affd., 209 N. Y. 540.....22, | 26 |
| Matter of Bierstadt | 178 App. Div. 836 | 167 |
| Matter of Bishop | 82 App. Div. 112, 115..507, | 509 |
| Matter of Blun | 176 App. Div. 189 | 167 |
| Matter of Bowers | 183 N. Y. Supp. 137 | 167 |
| Matter of Brady | 111 Misc. Rep. 492 | 43 |
| Matter of Bronson | 150 N. Y. 1, 8....506, 508, | 509 |
| Matter of Brundage | 31 App. Div. 348 | 363 |
| Matter of Burdick | 41 Misc. Rep. 346 | 83 |
| Matter of Butterfield | 133 N. Y. 473.....22, | 25 |
| Matter of Campbell | 123 App. Div. 212; affd., 192 N. Y. 312 | 155 |
| Matter of Choate | 105 App. Div. 356 | 457 |
| Matter of City of Niagara Falls. | 229 N. Y. 333 | 343 |
| Matter of City of Yonkers | 117 N. Y. 564 | 433 |
| Matter of Cohn | 187 App. Div. 392 | 44 |
| Matter of Colgrove | 221 N. Y. 455 | 22 |
| Matter of Cooley | 186 N. Y. 220 | 509 |
| Matter of Crickard | 52 Misc. Rep. 63, 66 | 83 |
| Matter of Curser | 89 N. Y. 401 | 153 |
| Matter of D'Agostino | 88 Misc. Rep. 371, 375 | 152 |
| Matter of Delano | 176 N. Y. 486; affd., *sub nom.* Chanler v. Kelsey, 205 U. S. 466 | 163 |
| Matter of DePeyster | 210 N. Y. 216 | 74 |
| Matter of Dobson | 146 N. Y. 357 | 640 |
| Matter of Dows | 167 N. Y. 227; affd., *sub nom.* Orr v. Gillman, 183 U. S. 278 | 163 |


Digitized by Google

| | | PAGE. |
|---|---|---|
| Matter of Durban..... | 175 App. Div. 688; affd., 220 N. Y. 589..... | 462 |
| Matter of Eddy..... | 10 Misc. Rep. 211.....459, | 462 |
| Matter of Enston..... | 113 N. Y. 174..... | 506 |
| Matter of Frazier..... | N. Y. L. J., Mar. 28, 1912.. | 163 |
| Matter of Gardner..... | 140 N. Y. 122.....304, | 305 |
| Matter of Goldenberg..... | 187 App. Div. 692.....311, | 312 |
| Matter of Gould..... | 19 App. Div. 352; 156 N. Y. 423 ..... | 363 |
| Matter of Gould Coupler Co.... | 79 Hun, 206..... | 443 |
| Matter of Gustow..... | 220 N. Y. 373..... | 83 |
| Matter of Hanford..... | 113 Misc. Rep. 639..... | 456 |
| Matter of Haxtum..... | 102 N. Y. 157..... | 294 |
| Matter of Hazard..... | 228 N. Y. 26..... | 365 |
| Matter of Hellman..... | 172 N. Y. Supp. 671; affd., 187 App. Div. 934; affd., 226 N. Y. 702..... | 47 |
| Matter of Henderson..... | 157 N. Y. 423.....377, | 378 |
| Matter of Hermann..... | 178 App. Div. 182..... | 378 |
| Matter of Hitchcock..... | 222 N. Y. 57.....22, 72, | 73 |
| Matter of Howe..... | 86 App. Div. 286; affd., 176 N. Y. 570..... | 165 |
| Matter of Hull..... | 111 App. Div. 322; affd., 186 N. Y. 586..... | 163 |
| Matter of Hunter..... | 189 App. Div. 805..... | 150 |
| Matter of International Railway Company v. Public Service Commission ..... | 226 N. Y. 479..... | 342 |
| Matter of James..... | 144 N. Y. 6, 10...164, 506, | 507 |
| Matter of Jensen v. Southern Pacific Co. ..... | 215 N. Y. 514, 522..... | 262 |
| Matter of Kemp..... | N. Y. L. J., Mar. 3, 1920.. | 367 |
| Matter of Kent..... | N. Y. L. J., June 17, 1920.. | 367 |
| Matter of Klein..... | 92 Misc. Rep. 318..... | 363 |
| Matter of Knoedler..... | 140 N. Y. 377..... | 453 |
| Matter of Lamb..... | 139 N. Y. Supp. 685..... | 83 |
| Matter of Lansing..... | 182 N. Y. 238, 247.....164, | 312 |
| Matter of Lee..... | 220 N. Y. 532..... | 83 |
| Matter of Lichtenberg..... | 171 N. Y. Supp. 570....89, | 90 |
| Matter of Livingston..... | 151 App. Div. 1..... | 314 |
| Matter of Lydig..... | 113 Misc. Rep. 263..... | 164 |
| Matter of McGillicuddy..... | 194 App. Div. 28..... | 363 |
| Matter of MacDowell..... | 217 N. Y. 454, 460..... | 77 |
| Matter of Mahon v. Board of Education ..... | 171 N. Y. 263..... | 250 |


Digitized by Google

| | | PAGE. |
|---|---|---|
| Matter of Majot | 199 N. Y. 29 | 164 |
| Matter of Mancini | 89 Misc. Rep. 83 | 83 |
| Matter of Martin | 211 N. Y. 328 | 230 |
| Matter of Moran | 5 Misc. Rep. 176 | 153 |
| Matter of Munson | 70 Misc. Rep. 461 | 41 |
| Matter of Naylor | 189 N. Y. 556; affg. 120 App. Div. 738 | 311 |
| Matter of Norwood | 111 Misc. Rep. 530 | 378 |
| Matter of Nuns | 176 N. Y. Supp. 858 | 402 |
| Matter of Ormsby v. Bell | 218 N. Y. 213, 216 | 658 |
| Matter of Parker | 226 N. Y. 260 | 166 |
| Matter of Parsons | 117 App. Div. 321 | 454 |
| Matter of Peck | N. Y. L. J., Mar. 3, 1920 | 367, 368 |
| Matter of Penfold | 216 N. Y. 163 | 365 |
| Matter of Pirie | 133 App. Div. 431 | 294 |
| Matter of Plath | 56 Hun, 223 | 457, 459 |
| Matter of Porter | 67 Misc. Rep. 19 | 88 |
| Matter of Quinby v. Public Service Commission | 223 N. Y. 244 | 343, 344 |
| Matter of Roberts | 214 N. Y. 369 | 294 |
| Matter of Rockefeller | 117 App. Div. 786–791; 223 N. Y. 563 | 76, 77, 78 |
| Matter of Romaine | 127 N. Y. 80 | 507 |
| Matter of Richards | 182 App. Div. 572, 575 | 508 |
| Matter of Schnabel | 202 N. Y. 134 | 40 |
| Matter of Seaman | N. Y. L. J., Dec. 5, 1913 | 163 |
| Matter of Security Trust Co | 221 N. Y. 213, 219 | 372, 373, 374 |
| Matter of Severance | 106 Misc. Rep. 710 | 378 |
| Matter of Shedd | 60 Hun, 367 | 159 |
| Matter of Sherman | 222 N. Y. 540 | 167 |
| Matter of Shonts | 229 N. Y. 374, 378, 382 | 379, 456, 461 |
| Matter of Slosson | 216 N. Y. 79 | 164 |
| Matter of Snook | 2 Hilt. 566 | 479 |
| Matter of Stearn | 9 N. Y. Supp. 445 | 459 |
| Matter of Terry | 218 N. Y. 218, 223 | 165 |
| Matter of Thaw | 182 App. Div. 368, 372 | 22, 73 |
| Matter of Thayer | 193 N. Y. 430 | 509 |
| Matter of Tilden | 98 N. Y. 434 | 377, 378 |
| Matter of Tone | 186 App. Div. 363 | 205 |
| Matter of Totten | 179 N. Y. 112 | 363 |
| Matter of Townsend | 215 N. Y. 442 | 377, 378 |


Digitized by Google

| | | PAGE. |
|---|---|---|
| Matter of Troy Press Co..... | 94 App. Div. 514; affd., 179 N. Y. 529..... | 639 |
| Matter of Turner..... | N. Y. L. J., June 17, 1920.. | 367 |
| Matter of Vanderbilt..... | 50 App. Div. 246; affd., 163 N. Y. 597; 187 App. Div. 716 .....163, | 365 |
| Matter of Vandewater..... | 115 N. Y. 669..... | 83 |
| Matter of Vassar..... | 127 N. Y. 1, 12..... | 363 |
| Matter of Village of Olean..... | 135 N. Y. 341..... | 433 |
| Matter of Wall..... | 76 Misc. Rep. 106..... | 369 |
| Matter of Wanninger..... | 3 N. Y. Supp. 137..... | 459 |
| Matter of Washbourne..... | 180 N. Y. Supp. 507; affd., 190 App. Div. 940; affd., 229 N. Y. 518..... | 365 |
| Matter of Watson..... | 215 N. Y. 209, 211; 226 id. 384, 401; affd., U. S. Sup. Ct., N. Y. L. J., Dec. 11, 1920 .....40, 41, 364, 365 366, 367, | 509 |
| Matter of Wentworth..... | 230 N. Y. 176..... | 512 |
| Matter of Whiting..... | 150 N. Y. 27–30.....507, | 509 |
| Matter of Wiemann's Estate... | 179 N. Y. Supp. 190..... | 363 |
| Matter of Wilcox..... | 194 N. Y. 288..... | 26 |
| Matter of Wilson..... | 92 Hun, 318..... | 155 |
| Matter of Wolfe..... | 181 App. Div. 35..... | 456 |
| Matter of Wyckoff..... | 67 Misc. Rep. 1..... | 86 |
| Matter of Zborowski..... | 213 N. Y. 109..... | 166 |
| Matter of Zimmerman..... | 110 Misc. Rep. 295..... | 365 |
| Matthews v. Brooklyn Savings Bank ..... | 208 N. Y. 508..... | 363 |
| Mead v. Young..... | 4 T. R. 28..... | 51 |
| Meekins v. Kinsella..... | 152 App. Div. 32.....200, | 202 |
| Meigs v. Roberts..... | 162 N. Y. 371, 378..... | 148 |
| Mentz v. Newwitter..... | 122 N. Y. 491.....355, | 532 |
| Mertz v. Hubbard..... | 75 Kan. 1..... | 532 |
| Message Photo Play Co., Inc., v. Bell ..... | 179 App. Div. 13, 19, 20... | 658 |
| Meyers v. Liebeskind..... | 46 Misc. Rep. 272..... | 100 |
| Meyer v. Redmond..... | 205 N. Y. 478.....531, | 533 |
| Michaels v. Hillman..... | 112 Misc. Rep. 395..... | 580 |
| Miller v. State of New York.... | 164 App. Div. 522; affd., 223 N. Y. 690..... | 434 |
| Milliman v. Huntington..... | 68 Hun, 258..... | 356 |
| Mills v. Davis..... | 53 N. Y. 349..... | 209 |


Digitized by Google

| | | PAGE. |
|---|---|---|
| Mills v. Hunt | 20 Wend. 431–433 | 533 |
| Miners & Merchants' Bank v. Ardsley Hall Co | 113 App. Div. 194 | 10 |
| Mishkind v. Sidorsky | 189 N. Y. 402 | 377 |
| Mitchell v. Schroeder | 94 Misc. Rep. 270 | 562 |
| Monk v. Town of New Utrecht | 104 N. Y. 552 | 282 |
| Montwil v. Am. Locomotive Co. | 159 N. Y. Supp. 21 | 415 |
| Monypeny v. Monypeny | 202 N. Y. 90 | 21 |
| Moore v. Harter | 67 Ohio St. 250, 254 | 516 |
| Moore v. Hillabrand | 16 Abb. N. C. 477 | 700 |
| Moore v. St. Thomas Church | 4 Abb. N. C. 51 | 9 |
| Morehouse v. Cooke | 1 Hopk. Ch. 226 | 83 |
| More v. Deyoe | 22 Hun, 208, 223 | 398 |
| Mortimer v. Chambers | 63 Hun, 335 | 297 |
| Mott v. Ackerman | 92 N. Y. 539 | 73 |
| Moultrie v. Hunt | 23 N. Y. 394 | 205 |
| Muhlenbrinck v. Pooler | 40 Hun, 526 | 451 |
| Mundorff v. Wangler | 57 How. Pr. 372 | 294 |
| Munn & Co. v. Americana Company | L. R. A. 1916D, 116, 117 | 525 |
| Munro v. State of New York | 223 N. Y. 208–214....247, 248 249, 250, 253, | 261 |
| Munro v. Tousey | 129 N. Y. 38, 41, 42 | 656 |
| Murdock v. Gould | 193 N. Y. 369 | 319 |
| Murphy v. Estate of Skinner | 160 Wis. 554 | 54 |
| Murphy v. Holmes | 87 App. Div. 369 | 232 |
| Mutual Life Ins. Co. v. Newell | 78 Hun, 293 | 143 |


## N.


| | | |
|---|---|---|
| Nash v. Wetmore | 33 Barb. 155 | 692 |
| Nathan v. Woolverton | 69 Misc. Rep. 425; affd., 147 App. Div. 908 | 70 |
| National Bank of Commerce v. First National Bank | 152 Pac. Repr. 596 | 54 |
| National Protective Association v. Cumming | 170 N. Y. 315–324....186, 187 190, | 670 |
| Navarre H. & I. Co. v. American Appraisal Co | 156 App. Div. 795, 797 | 531 |
| Navratil v. Bohm | 26 App. Div. 460 | 61 |
| Nelson v. Kerr | 59 N. Y. 224.....209, 210, | 211 |
| New York Central Iron Works Co. v. Brennan | 105 N. Y. Supp. 865–869 | 581 |
| New York Rubber Co. v. Rothery | 107 N. Y. 310 | 287 |




Digitized by Google

## O.


| | | |
|---|---|---|
| Obecny v. Goetz | 116 App. Div. 807 | 205 |
| O'Beirne v. Miller | 35 Misc. Rep. 337 | 61 |
| Oberndorf v. Farmers' Loan & Trust Co | 71 Misc. Rep. 64 | 159 |
| O'Brien v. Neubert | 3 Dem. 156 | 155 |
| O'Hara v. State of New York | 112 N. Y. 146 | 250 |
| Olin v. Bate | 98 Ill. 53 | 479 |
| Oliver Lee & Co.'s Bank v. Walbridge | 19 N. Y. 136 | 5 |
| O'Neill v. General Film Co | 171 App. Div. 854–867 | 529 |
| O'Neil v. State of New York | 223 N. Y. 40 | 271 |
| Osterhoudt v. Osterhoudt | 48 App. Div. 74, 77 | 83 |
| Ostrander v. Reis | 206 N. Y. 448, 454, 455 | 150 |
| Oswego & Syracuse R. R. Co. v. State of New York | 186 N. Y. 384; affd., 226 N. Y. 351 | 254 |
| Oswego Starch Factory Co. v. Dolloway | 21 N. Y. 449 | 59 |
| Otis Steel Co., Limited, v. Local Union No. 218 of Cleveland, Ohio | 110 Fed. Repr. 698 | 671 |


## P.


| | | |
|---|---|---|
| Palmer v. State of New York | 174 App. Div. 933; affd., 220 N. Y. 565 | 435 |
| Parker v. Bradley | 46 N. Y. Super. Ct. 244 | 209 |
| Parucki v. Polish National Catholic Church of the Holy Mother of the Rosary | 177 N. Y. Supp. 206 | 7 |
| Peck v. Hiller | 30 Barb. 656 | 692 |
| Pennoyer v. Neff | 95 U. S. 714 | 130 |
| People v. Cancemi | 18 N. Y. 128 | 65 |
| People v. Cosmo | 205 N. Y. 91 | 65 |
| People v. D'Argencour | 95 N. Y. 624 | 65 |
| People v. Glen | 173 N. Y. 395 | 63 |
| People v. Home Ins. Co | 92 N. Y. 328 | 508 |
| People v. Melvin | 1 Yates Sel. Cas. 81 | 580 |
| People v. Mutual Gas Light Co. | 74 N. Y. 434, 436 | 171 |
| People v. N. Y. C. R. R. Co | 24 N. Y. 485 | 244 |
| People v. New York & Manhattan Beach R. Co | 84 N. Y. 569 | 38 |
| People v. Rathbun | 21 Wend. 509 | 65 |


Digitized by Google

| | | Page. |
|---|---|---|
| People v. Sharp | 107 N. Y. 427 | 134 |
| People v. Toledo | 150 App. Div. 403 | 65 |
| People v. Tweed | 5 Hun, 382, 389 | 476 |
| People v. Van Rensselaer | 9 N. Y. 330, 334.....611, | 616 |
| People v. Weser | N. Y. L. J., Dec. 3, 1919.. | 38 |
| People v. Wiechers | 179 N. Y. 459 | 65 |
| People v. Willett | 213 N. Y. 368, 375 | 64 |
| People ex rel. Adams v. Westbrook | 61 How. Pr. 138 | 294 |
| People ex rel. Ajas v. Board of Education | 104 App. Div. 162, 164.... | 659 |
| People ex rel. Alpha P. C. Co. v. Knapp | 230 N. Y. 48 | 508 |
| People ex rel. Bank of New York v. Board of Supervisors, etc.. | 37 N. Y. 21, 23.....421, | 422 |
| People ex rel. Beck v. Coler.... | 34 App. Div. 167 | 224 |
| People ex rel. Boenig v. Hegeman. | 220 N. Y. 118 | 148 |
| People ex rel. Bolton v. Albertson | 55 N. Y. 55 | 243 |
| People ex rel. Brush v. Brown.. | 20 Wkly. Dig. 516 | 83 |
| People ex rel. Burby v. Howland | 155 N. Y. 280 | 244 |
| People ex rel. Duffy v. Gilchrist. | N. Y. L. J., Aug. 16, 1919; affd., 190 App. Div. 898. | 658 |
| People ex rel. Durant Land Imp. Co. v. Jerolman | 139 N. Y. 14, 17 | 659 |
| People ex rel. Empire City Trotting Club v. State Racing Comm. | 190 N. Y. 31, 33, 34 | 658 |
| People ex rel. Faile v. Ferris.. | 76 N. Y. 329 | 217 |
| People ex rel. Garrison v. Nixon. | 229 N. Y. 575, 586.....343, | 345 |
| People ex rel. Gas-Light Co. v. Common Council | 78 N. Y. 56 | 217 |
| People ex rel. Guidet v. Green.. | 66 Barb. 630 | 225 |
| People ex rel. Hatch v. Reardon. | 184 N. Y. 431, 449; affd., 204 U. S. 152, 162...507, | 509 |
| People ex rel. Jackson v. Potter. | 42 How. Pr. 260, 261, 262, 270; affd., 47 N. Y. 375.. | 80 |
| People ex rel. Knick. Press v. Barker | 87 Hun, 341 | 59 |
| People ex rel. Lentilhon v. Coler. | 61 App. Div. 223; 168 N. Y. 6.....224, | 225 |
| People ex rel. McClelland v. Dowling | 55 Barb. 197 | 217 |


Digitized by Google

| | | PAGE. |
|---|---|---|
| People ex rel. McMackin v. Police Commissioners | 107 N. Y. 235 | 217 |
| People ex rel. Met. St. Ry. Co. v. Tax Commissioners | 174 N. Y. 434, 437 | 510 |
| People ex rel. Mizpah Lodge v. Burke | 228 N. Y. 245 | 125, 126 |
| People ex rel. Onondaga County Savings Bank v. Butler | 147 N. Y. 164, 168, 169 | 80 |
| People ex rel. Palmer v. Travis. | 223 N. Y. 150 | 433, 435 |
| People ex rel. Pruyne v. Walts.. | 122 N. Y. 238 | 83 |
| People ex rel. Wall & Hanover St. Realty Co. v. Miller | 181 N. Y. 328 | 74, 508 |
| People ex rel. Williams v. Dayton | 55 N. Y. 374 | 257 |
| People ex rel. Wood v. Assessors. | 138 N. Y. 201, 204 | 659 |
| People ex rel. Wynn v. Grifenhagen | 167 App. Div. 572 | 507 |
| Peoples Bank v. St. Anthony's R. C. Church | 109 N. Y. 512 | 9 |
| Perkins v. Stimmel | 114 N. Y. 359 | 297 |
| Peterson v. Martino | 210 N. Y. 412 | 149 |
| Pettibone v. United States | 148 U. S. 197 | 678 |
| Pflum v. Spencer | 123 App. Div. 742 | 451 |
| Pfotenhauer v. Brooker | 52 Misc. Rep. 649 | 378 |
| Phillips v. Tietjen | 108 App. Div. 9 | 55 |
| Phillips v. Wheeler | 2 Hun, 603; affd., 67 N. Y. 104 | 209, 211, 212 |
| Pierce v. Stablemen's Union, Local, etc | 156 Cal. 70 | 671 |
| Pierson v. People | 79 N. Y. 424 | 65 |
| Pluck v. Digges | 2 Dow & C. 180 | 615 |
| Price v. Mulford | 107 N. Y. 303 | 140 |
| Pritchard v. Hirt | 39 Hun, 380 | 398 |
| Pope v. Hart | 36 Barb. 636 | 398 |
| Pope v. Terre Haute Car & Mfg. Co. | 107 N. Y. 61 | 381 |
| Post v. Kearney | 2 N. Y. 394 | 541 |
| Post v. Moore | 181 N. Y. 15 | 305 |


## Q.


| | | |
|---|---|---|
| Quayle v. State of New York.. | 192 N. Y. 47, 51 | 499 |
| Quinto v. Alexander | 123 App. Div. 1 | 548 |


Digitized by Google

R.


| | | PAGE. |
|---|---|---|
| Railroad Company v. Peniston.. | 18 Wall. 5..... | 423 |
| Randolph v. Field..... | 84 Misc. Rep. 403..... | 322 |
| Rapelye v. Prince..... | 4 Hill, 125..... | 692 |
| Raven v. Smith..... | 87 Hun, 90..... | 443 |
| Reardon, Inc. v. Caton..... | 189 App. Div. 501.....680, | 681 |
| Reardon v. International Mercantile Marine Co..... | 189 App. Div. 515.....680, | 681 |
| Reed v. Reed..... | 106 Misc. Rep. 85..... | 199 |
| Reinertsen v. Erie R. R. Co.... | 66 Misc. Rep. 229..... | 708 |
| Reisfeld v. Jacobs..... | 107 Misc. Rep. 1..... | 329 |
| Reithman v. Brandenburg..... | 7 Colo. 480..... | 516 |
| Rexford v. State of New York.. | 105 N. Y. 229..... | 278 |
| Rice v. Manley..... | 66 N. Y. 82..... | 185 |
| Rice v. Ontario S. B. Co..... | 56 Barb. 387..... | 4 |
| Ridden v. Thrall..... | 125 N. Y. 572, 579.....487, | 488 |
| Riglander v. Star Company.... | 98 App. Div. 101; affd., 181 N. Y. 531..... | 707 |
| Ring v. City of Cohoes..... | 77 N. Y. 83..... | 279 |
| Roberson v. Rochester Folding Box Co..... | 171 N. Y. 538..... | 479 |
| Robert v. Corning..... | 89 N. Y. 225, 235..... | 25 |
| Roberts v. Hayward..... | 3 Car. & P. 432..... | 516 |
| Roberts v. State of New York.. | 160 N. Y. 217..... | 496 |
| Robin v. Colaizzi..... | 101 Misc. Rep. 298..... | 69 |
| Robinson v. Ball..... | 187 App. Div. 799..... | 402 |
| Robinson v. Fay..... | 19 N. Y. Supp. 120..... | 443 |
| Robinson v. Robinson..... | 146 App. Div. 533..... | 701 |
| Rogers v. Patterson..... | 79 Hun, 483..... | 296 |
| Rolker v. Great Western Insurance Company..... | 4 Abb. Ct. App. Dec. 73.... | 699 |
| Romaine v. Van Allen..... | 26 N. Y. 309..... | 700 |
| Rommel v. Schambacher..... | 120 Penn. St. 579, 582..... | 178 |
| Roseboom v. Roseboom..... | 81 N. Y. 359..... | 304 |
| Rosenberg v. Haggerty..... | 189 N. Y. 485..... | 688 |
| Rosenblatt v. Josephson..... | 172 N. Y. Supp. 719..... | 706 |
| Rossie Iron Works v. Westbrook. | 59 Hun, 345..... | 59 |
| Round Lake Assn. v. Kellogg... | 20 N. Y. Supp. 261; affd., 141 N. Y. 348..... | 9 |
| Rourke v. Elk Drug Co..... | 75 App. Div. 145..... 576, | 677 |
| Rouse v. Payne..... | 120 App. Div. 667..... | 297 |
| Rothbarth v. Herzfeld..... | 179 App. Div. 865; affd., 223 N. Y. 578..... | 695 |


Digitized by Google

| | | PAGE. |
|---|---|---|
| Russell v. Prudential Insurance Co. | 176 N. Y. 178 | 474 |
| Ryan v. Dox | 34 N. Y. 307 | 411, 412 |

S.

| | | |
|---|---|---|
| Salen v. Bank of the State of New York | 110 App. Div. 636 | 53 |
| Salisbury v. Slade | 160 N. Y. 278 | 72 |
| Salomon v. Salomon | 101 App. Div. 588 | 703 |
| Sanderson v. Morgan | 39 N. Y. 231 | 695 |
| Sands v. St. John | 36 Barb. 24 | 567 |
| Sands v. Waldo | 100 Misc. Rep. 288, 293, 294 | 304 |
| Saratoga County Bank v. Pruyn | 90 N. Y. 250 | 160 |
| Saunders v. Hanes | 44 N. Y. 353 | 619 |
| Saxe v. Penokee Lumber Co | 159 N. Y. 371 | 332 |
| Scarff v. Metcalf | 107 N. Y. 211 | 589 |
| Schenectady Observatory v. Allen | 42 N. Y. 404 | 244 |
| Schmidt v. Gunther | 5 Daly, 452–453 | 576 |
| Schmidt v. Simpson | 204 N. Y. 434, 438 | 537 |
| Schuyler v. Smith | 51 N. Y. 308, 309 | 450, 515 |
| Schwarz v. Regensburg & Son | 168 App. Div. 903; affd., 223 N. Y. 521 | 415 |
| Schwartz v. Schwartz | 113 Misc. Rep. 444 | 348 |
| Scofield v. Day | 20 Johns. 102 | 4 |
| Scott v. Rogers | 31 N. Y. 676 | 700 |
| Seaboard National Bank v. Bank of America | 193 N. Y. 26 | 51 |
| Seely v. Seely | 164 App. Div. 652 | 150 |
| Selig Polyscope Co. v. Unicorn Film Service Corp | 163 N. Y. Supp. 62 | 524 |
| Seymour v. Wilson | 14 N. Y. 567 | 397 |
| Seymour v. Wyckoff | 10 N. Y. 213 | 699 |
| Sharot v. City of New York | 177 App. Div. 869; affd., 226 N. Y. 679 | 279 |
| Sheldon v. Button | 5 Hun, 110 | 489 |
| Sheldon v. Lake | 9 Abb. Pr. N. S. 306 | 406 |
| Sheldon v. Stryker | 27 How. Pr. 387 | 692 |
| Shepard v. Oakley | 181 N. Y. 339 | 217 |
| Sherin Special Agency v. Seaman | 49 App. Div. 33 | 501 |
| Sherman v. Corn Exchange Bank | 91 App. Div. 84 | 53 |
| Sherman v. Pullman Co | 79 Misc. Rep. 52 | 68 |


Digitized by Google

| | | PAGE. |
|---|---|---|
| Simpson v. Jersey City Contracting Co | 165 N. Y. 193 | 507 |
| Sioux Remedy Co. v. Cope | 235 U. S. 197 | 552 |
| Sipple v. State of New York | 99 N. Y. 285, 287, 288..428, | 499 |
| Skolny v. Hillman | 114 Misc. Rep. 571 | 667 |
| Slater v. United Traction Co | 172 App. Div. 404 | 402 |
| Slingerland v. Corwin | 105 App. Div. 310, 311 | 568 |
| Smith v. Chesebrough | 176 N. Y. 317..... 22, | 73 |
| Smith v. Clews | 114 N. Y. 190 | 536 |
| Smith v. Fleischman | 23 App. Div. 355 | 443 |
| Smith v. Finkelstein | 162 App. Div. 128 | 319 |
| Smith v. Littlefield | 51 N. Y. 539 | 450 |
| Smith v. People | 47 N. Y. 330, 339 | 80 |
| Smith v. Rector | 107 N. Y. 610, 619 | 318 |
| Smith v. Smith | 2 Dem. 43 | 82 |
| Smith v. State of New York | 227 N. Y. 405.....278, 445, 495 497, 500 | |
| Smith v. U. S. Casualty Co | 197 N. Y. 420, 428 | 479 |
| Southwick v. First Nat. Bank of Memphis | 84 N. Y. 420, 429 | 571 |
| Spanedda v. Murphy | 144 App. Div. 58 | 61 |
| Spencer v. Spencer | 219 N. Y. 459 | 91 |
| Squier v. Hanover Fire Ins. Co. | 18 App. Div. 575, 578 | 475 |
| Standard Steam Specialty Co. v. Corn Exchange Bank | 84 Misc. Rep. 445 | 51 |
| Stanton v. Miller | 58 N. Y. 192 | 357 |
| Starkweather v. Kittle | 17 Wend. 20 | 568 |
| State of Colorado v. Harbeck | 189 App. Div. 865, 872 | 164 |
| Steinhardt v. Baker | 20 Misc. Rep. 470; affd., 163 N. Y. 410 | 377 |
| Stein v. Empire Trust Co | 148 App. Div. 850 | 51 |
| Stephens v. Commissioners of Palisades Interstate Park | 108 Atl. Repr. 645.....429, | 430 |
| Stern & Co. v. Avendon & Co., Inc. | 111 Misc. Rep. 372....515, | 516 |
| Stevens v. City of New York | 111 App. Div. 562.....515, | 516 |
| Stevens v. Stevens | 2 Dem. 469 | 294 |
| Stewart v. Long Island R. R. Co. | 102 N. Y. 601 | 541 |
| Stewart v. Stone | 127 N. Y. 500 | 326 |
| Storgard v. France & Canada S. S. Corporation | 263 Fed. Repr. 545.....588, | 589 |
| Strohmeyer & Arpe Co. v. Guaranty Trust Co | 172 App. Div. 16 | 706 |
| Susu v. Caffe | 122 N. Y. 308-320 | 160 |


Digitized by Google

| | | PAGE. |
|---|---|---|
| Sultan v. Star Co., Inc..... | 106 Misc. Rep. 43..... | 578 |
| Swanson v. Cooke..... | 45 Barb. 574..... | 4 |
| Sweet v. Perkins..... | 196 N. Y. 482..... | 279 |
| Syms v. City of New York..... | 105 N. Y. 153..... | 452 |

## T.

| | | |
|---|---|---|
| Tarbell v. West..... | 86 N. Y. 288..... | 151 |
| Taylor v. Goelet..... | 208 N. Y. 253.....382, | 383 |
| Taylor v. Porter..... | 4 Hill, 144..... | 244 |
| Taylor v. Security Mutual Life Ins. Co..... | 73 App. Div. 318..... | 568 |
| Temperton v. Russell..... | (1893) 1 Q. B. 715..... | 183 |
| The Bouker No. 2..... | 241 Fed. Repr. 831..... | 588 |
| Thomas v. Scutt..... | 127 N. Y. 133.....319, | 320 |
| Thompson v. Goldstone..... | 171 App. Div. 666, 668..534, | 536 |
| Thompson v. Town of Bath.... | 142 App. Div. 331..... | 279 |
| Tifft v. Porter..... | 8 N. Y. 516..... | 374 |
| Town of Hancock..... | 142 N. Y. 510..... | 280 |
| Town of Oyster Bay v. Jacob.. | 109 App. Div. 615..... | 33 |
| Townsend v. Townsend..... | 2 Sandf. 711..... | 160 |
| Trustees Exempt Firemen's Benev. Fund v. Roome..... | 93 N. Y. 313..... | 253 |
| Turner v. Fulcher..... | 165 N. Y. Supp. 282..... | 182 |
| Turner v. Scott..... | 51 Penn. St. 126, 134..... | 486 |
| Tyson v. Bauland Co..... | 68 App. Div. 310..... | 407 |

## U.

| | | |
|---|---|---|
| Uhlfelder v. Tamsen..... | 15 App. Div. 436..... | 441 |
| Ullman v. Ullman..... | 151 App. Div. 419..... | 83 |
| Union Bag & Paper Co. v. Allen Brothers' Co..... | 107 App. Div. 529..... | 626 |
| Union National Bank v. Chapman ..... | 168 N. Y. 538..... | 335 |
| United States F. & G. Co. v. Carnegie Trust Co..... | 161 App. Div. 429; affd., 213 N. Y. 629..... | 441 |
| U. S. Radiator Co. v. State of New York..... | 208 N. Y. 144, 148..... | 509 |
| United States Realty & Imp. Co. v. Ewing..... | 172 N. Y. Supp. 214..... | 386 |
| Upton Co. v. Flynn..... | 169 App. Div. 79..... | 441 |
| Usher v. New York C. & H. R. R. Co..... | 76 App. Div. 422; affd., 179 N. Y. 544..... | 415 |


Digitized by Google

## V.


| | | PAGE. |
|---|---|---|
| Van Allen v. Assessors | 3 Wall. (U. S.) 573 | 509 |
| Van Rensselaer v. Ball | 19 N. Y. 100 | 610 |
| Van Rensselaer v. Bonesteel | 24 Barb. 356 | 616 |
| Van Rensselaer v. Bradley | 3 Den. 135 | 616 |
| Van Rensselaer v. Dennison | 35 N. Y. 393 | 617, 619 |
| Van Rensselaer v. Gallup | 5 Den. 454 | 616 |
| Van Rensselaer v. Hays | 5 Den. 477; 19 N. Y. 68 | 615, 616, 622 |
| Van Rensselaer v. Jewett | 5 Den. 121 | 616 |
| Van Rensselaer v. Jones | 5 Den. 449 | 616 |
| Van Rensselaer v. Read | 26 N. Y. 558, 563 | 617, 618 |
| Van Rensselaer v. Roberts | 5 Den. 470 | 616 |
| Van Rensselaer v. Snyder | 13 N. Y. 299 | 616 |
| Vegelahn v. Guntner | 167 Mass. 92 | 671 |
| Village of Carthage v. Frederick | 122 N. Y. 268 | 639 |
| Von Der Heyde v. Ditmars | 174 App. Div. 390 | 347 |


## W.


| | | |
|---|---|---|
| Wade v. Town of Worcester | 134 App. Div. 51 | 282 |
| Waldron v. Schlang | 47 Hun, 252 | 73 |
| Walker v. Mansfield | 221 Mass. 600 | 164 |
| Wallace v. International Paper Co. | 53 App. Div. 41 | 146 |
| Wallace v. McEchron | 176 N. Y. 424 | 147 |
| Waller v. Degnon Cont. Co | 120 App. Div. 389 | 570 |
| Waller v. Town of Hebron | 5 App. Div. 577; affd., 17 App. Div. 158; 131 N. Y. 447 | 282 |
| Walsh v. Durkin | 12 Johns. 99 | 130 |
| Warner v. Durant | 76 N. Y. 133 | 25 |
| Ward v. Hasbrouck | 169 N. Y. 407 | 532 |
| Warmser v. Brown, K. & Co | 187 N. Y. 87 | 70 |
| Warner v. People | 2 Den. 272 | 244 |
| Waters, Inc. v. Hatters' Fur Exchange, Inc | 185 App. Div. 803 | 708 |
| Watson v. Gugino | 204 N. Y. 535 | 269 |
| Watts v. Coffin | 11 Johns. 495 | 616 |
| Weinberg v. Greenberger | 47 Misc. Rep. 117 | 559 |
| Weisberger Co. v. Barberton Savings Bank | 84 Ohio St. 21; 34 L. R. A. (N. S.) 1101 | 52 |
| Wheeler v. Reynolds | 66 N. Y. 227, 236, 237 | 411 |
| Wheeler-Stenzel Co. v. American Window Glass Co | 202 Mass. 471 | 183 |


Digitized by Google

| | | PAGE. |
|---|---|---|
| Wheeler v. State of New York.. | 190 N. Y. 406.....250, 253, | 254 |
| Whipple v. Prudential Ins. Co.. | 222 N Y. 39, 43.....473, | 474 |
| White v. Wager..... | 25 N. Y. 328..... | 160 |
| White v. White..... | 154 App. Div. 250..... | 703 |
| Wightman v. Schliefer..... | 18 N. Y. Supp. 551..... | 160 |
| Williams v. Guile..... | 117 N. Y. 343..... | 488 |
| Wilson v. Tabernacle Baptist Church ..... | 28 Misc. Rep. 268..... | 10 |
| Wilson v. Wilson..... | 158 Ill. 567..... | 487 |
| Wilson v. Wright..... | 9 How. Pr. 459..... | 212 |
| Windmuller v. Pope..... | 107 N. Y. 674..... | 331 |
| Winfield v. Stacom..... | 40 App. Div. 95..... | 442 |
| Winslow v. B. & O. R. R. Co.... | 188 U. S. 646..... | 451 |
| Wolf v. Wolf..... | 194 App. Div. 33..... | 183 |
| Wood v. Baker..... | 43 Misc. Rep. 310..... | 201 |
| Wood v. Wood..... | 26 Barb. 356..... | 297 |
| Woods v. De Figaniere..... | 1 Robt. 607, 610.....169, | 171 |
| Wooley v. Stewart..... | 222 N. Y. 347, 350..... | 411 |
| Wright v. Weeks..... | 25 N. Y. 153..... | 357 |

Y.

| | | |
|---|---|---|
| Young v. City of Rochester.... | 73 App. Div. 81..... | 271 |


## NEW YORK STATE CONSTITUTION CITED.


| PAGE. | PAGE. |
|---|---|
| Const. art. III, § 12..... 243 | Const. 1894, art. III, § 27. 637 |
| Const. 1846, art. III, § 17; amendt. 1874, art. III, § 23 ..... 637 | Const. art. III, § 28...240, 243 244, 246, 247, 250, 252, 262 |
| Const. 1846, as amd. 1874, art. III, § 18..... 637 | Const. art. IV, § 26..... 241 |
| Const. art. III, § 19....239, 240 245, 246, 247, 252, 258, 263 | Const. art. VIII, § 9..... 247 |


## UNITED STATES STATUTES AT LARGE CITED.


| PAGE. | |
|---|---|
| 39 U S. Stat. at Large, 728..... | 679 |


Digitized by Google

## UNITED STATES REVISED STATUTES CITED.


| | PAGE. |
|---|---|
| U. S. R. S., § 3701 | 420, 421, 423 |


## NEW YORK REVISED STATUTES CITED.


| | PAGE. |
|---|---|
| 2 R. S. pt. 2, ch. 1, tit. 5, §§ 1, 2 | 609 |
| 2 R. S. pt. 3, ch. 8, tit. 9, art. 2, § 1 | 618 |
| 2 R. S. 620, pt. 3, ch. 10, tit. 2 | 502 |
| 2 R. S. § 59 | 703 |


## CONSOLIDATED LAWS CITED.


| Consolidated Laws: | PAGE. |
|---|---|
| chap. 6, §§ 50, 51 | 478 |
| chap. 13, § 35 | 205, 693 |
| chap. 13, § 36 | 204 |
| chap. 13, § 47 | 13 |
| chap. 13, § 101 | 295, 296 |
| chap. 14, § 70 | 704 |
| chap. 14, § 111 (3) | 313, 314 |
| chap. 14, § 113 | 314 |
| chap. 20, § 345 | 134, 136, 137 |
| chap. 22, § 15 | 551, 552 |
| chap. 22, § 16 | 116, 552 |
| chap. 23, § 34 | 8 |
| chap. 25, §§ 3(2), 176 | 445 |
| chap. 25, § 176 | 278, 445 |
| chap. 33, §§ 11, 13 | 441 |
| chap. 34, § 7 | 266, 269, 270 |
| chap. 35 | 75 |
| chap. 38, § 42 | 51 |
| chap. 38, § 321 | 355 |
| chap. 40, § 43 | 699 |
| chap. 40, § 62 | 698, 699 |
| chap. 41, § 15 | 512 |
| chap. 41, § 43 | 536 |
| chap. 41, § 85 | 329 |
| chap. 41, § 100, rule 4, subds. 1, 2 | 545 |
| chap. 41, § 144(1) | 545 |
| chap. 41, §§ 145, 156 | 329, 330 |
| chap. 48, § 5(3) | 340 |
| chap. 49, art. IV | 339 |
| chap. 49, § 181 | 340, 341, 343 |
| chap. 50, § 41 | 165 |
| chap. 50, § 42 | 72 |
| chap. 50, §§ 97, 99 | 27 |
| chap. 50, § 230 | 517 |
| chap. 50, § 240 | 609 |
| chap. 50, § 259 | 548 |
| chap. 50, § 378(3) | 720 |
| chap. 51, § 5 | 585 |
| chap. 51, art. X | 582 |
| chap. 59, § 66 | 95 |
| chap. 60, § 2(8) | 420 |


Digitized by Google

| Consolidated Laws: | PAGE. |
|---|---|
| chap. 60, § 4(7)..... | 125 |
| chap. 60, § 12..... | 420 |
| chap. 60, § 132.146, 147, | 149 |
| chap. 60, § 134.....149, | 150 |
| chap. 60, §§ 181, 182.... | 508 |
| chap. 60, § 210..... | 510 |
| chap. 60, § 220(2)..... | 510 |
| chap. 60, § 220(3)..... | 87 |
| chap. 60, § 220(5)..... | 312 |
| chap. 60, § 220(6)..... | 162 |
| chap. 60, § 221..... | 74 |
| chap. 60, § 221-b....167, | 364 |
| 365, 366, 367, | 510 |
| chap. 60, § 230.....312, | 368 |
| chap. 60, §§ 230, 241.165, | 166 |


## SESSION LAWS CITED.


| | | | PAGE. |
|---|---|---|---|
| 1804, | chap. | 31 ..... | 635 |
| 1805, | " | 132 ..... | 635 |
| 1806, | " | 146 ..... | 635 |
| 1807, | " | 142 ..... | 635 |
| 1813, | " | 65 ..... | 636 |
| 1817, | " | 189 ..... | 636 |
| 1822, | " | 127 ..... | 634 |
| 1822, | " | 137 ..... | 636 |
| 1853, | " | 578 ..... | 640 |
| 1854, | " | 98 ..... | 640 |
| 1868, | " | 191 ..... | 640 |
| 1875, | " | 482 ..... | 638 |
| 1881, | " | 132, 374, 570... | 638 |
| | | | 640 |
| 1884, | " | 252, §§ 4, 13....339, | |
| | | 340, 343, | 344 |
| 1884, | " | 381 ..... | 159 |
| 1885, | " | 238 ..... | 258 |
| 1886, | " | 65 ..... | 339 |
| 1890, | " | 565, art. IV.340, | 344 |
| 1895, | " | 595 ..... | 230 |
| 1897, | " | 284 ..... | 312 |
| 1900, | " | 170, § 1....427, | 429 |
| 1900, | " | 170, §§ 2, 4, 5.. | 428 |
| 1900, | " | 725 ..... | 250 |
| 1906, | " | 691 ..... | 428 |
| 1909, | " | 7, § 39.266, 269, | 270 |
| 1909, | " | 13, § 47....714, | 719 |
| 1909, | chap. | 30, § 74....277, | 278 |
| 1909, | " | 58, § 35..... | 270 |
| 1910, | " | 361 ..... | 428 |
| 1911, | " | 509 ..... | 687 |
| 1911, | " | 732 ..... | 312 |
| 1911, | " | 746, § 8....432, | 433 |
| 1911, | " | 779 ..... | 271 |
| 1912, | " | 548, §§ 3, 7.... | 503 |
| 1913, | " | 230 ..... | 563 |
| 1913, | " | 569 ..... | 313 |
| 1914, | " | 15 ..... | 429 |
| 1915, | " | 562 .....428, | 429 |
| 1915, | " | 664, § 220(2).. | 508 |
| 1917, | " | 168 ..... | 428 |
| 1917, | " | 472, §§ 129, 130. | 713 |
| | | | 714 |
| 1917, | " | 700, § 2..... | 364 |
| 1918, | " | 569 ..... | 269 |
| 1918, | " | 585 ..... | 256 |
| 1919, | " | 177 ..... | 269 |
| 1919, | " | 293, § 35..204, | 205 |
| 1919, | " | 459 ..... | 250 |
| 1919, | " | 581 ..... | 497 |
| 1919, | " | 627 ..... | 368 |
| 1920, | " | 136 ....79, 80, | 518 |
| 1920, | " | 138 ..... | 517 |
| 1920, | " | 283 .....428, | 429 |
| 1920, | " | 942 ..92, 107, | 397 |


Digitized by Google

| | PAGE. |
|---|---|
| 1920, chap. 944.....79, 80, 175 517, 518, 519 | |
| 1920, " 944, § 4..... | 518 |
| 1920, chap. 945 .....79, | 80 |
| 1920, " 947 ..... | 517 |
| 1920, " 952 ..... | 81 |


# CODE OF CIVIL PROCEDURE CITED.


| Code of Civil Procedure. | PAGE. |
|---|---|
| § 264 .....279, 495, 498, | 500 |
| § 268 ..... | 274 |
| § 290 ..... | 211 |
| § 373 ..... | 622 |
| § 375 ..... | 170 |
| § 382(5) .....140, | 141 |
| § 410 ..... | 139 |
| § 431(3) .....561, | 563 |
| § 432(1) ..... | 116 |
| § 435 .....563, | 564 |
| § 440 ..... | 347 |
| § 452 ..... | 441 |
| § 483 ..... | 407 |
| § 500 ..... | 567 |
| § 531 ..... | 570 |
| § 548 ..... | 476 |
| §§ 550, 575 .....475, | 476 |
| § 575 ..... | 477 |
| § 723 ..... | 212 |
| § 793 ..... | 708 |
| §§ 797, 802 ..... | 348 |
| §§ 870, 872 .....169, 171, | 173 |
| § 968 ..... | 32 |
| § 984 .....55, | 56 |
| § 1366 ..... | 209 |
| § 1504 ..... | 632 |
| § 1525 .....687, | 688 |
| § 1638, art. 5..... | 684 |
| § 1646 .....687, | 688 |
| § 1679 .....685, | 686 |
| § 1744 ..... | 201 |
| §§ 1747, 1748 .....199, | 200 |
| § 1766 .....701, | 702 |
| § 1771 .....314, 702, | 703 |
| § 1836-a ..... | 21 |
| § 1843 ..... | 295 |
| § 2231(1-a) ..... | 92 |
| § 2233 ..... | 31 |
| § 2244 ..... | 80 |
| § 2490(6) ..... | 377 |
| § 2510 ..... | 42 |
| §§ 2510, 2706 ..... | 293 |
| § 2550 ..... | 379 |
| § 2564 ..... | 154 |
| § 2565 ..... | 154 |
| § 2588 .....152, | 154 |
| § 2588(2) ..... | 152 |
| § 2596 ..... | 456 |
| §§ 2596, 2597 .....456, | 457 |
| § 2615 ..... | 71 |
| § 2645 ..... | 83 |
| § 2649 ..... | 86 |
| § 2670..156, 157, 158, 159, | 160 |
| § 2671 ..... | 156 |
| § 2677 ..... | 228 |
| §§ 2680(2), 2681..229, 230, | 231 |
| § 2697 ..... | 284 |
| § 2731 .....40, 41, | 42 |
| § 2746 ..... | 463 |
| § 2763 ..... | 379 |
| § 3268 ....501, 502, 504, | 505 |


Digitized by Google

## PENAL LAW CITED.


| Penal Law. | PAGE. | Penal Law. | PAGE. |
|---|---|---|---|
| § 38 | 134 | §§ 1425, 2036 | 37 |
| § 580(5) | 34, 38 | | |


## UNITED STATES CRIMINAL CODE CITED.


| | PAGE. |
|---|---|
| U. S. Criminal Code, § 37 | 679 |


## MUNICIPAL COURT CODE CITED.


| | PAGE. |
|---|---|
| Mun. Court Code, §§ 21, 23 | 561, 562 |


## RULES CITED.


| | PAGE. |
|---|---|
| General Rules of Practice, rule XLVIII | 61 |


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THE
# MISCELLANEOUS REPORTS
OF THE
## STATE OF NEW YORK
COMMENCING DECEMBER, 1920.

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THEODORE REVILLON, Plaintiff, *v.* ROD A. DEMME, Defendant.

(Supreme Court, Kings Special Term, December, 1920.)

**Negotiable instruments — promissory notes made payable in France — when loss from depreciation of French money is not an element of damage — rate of exchange — evidence.**

Where at the time certain promissory notes given for the purchase price of shares in a French corporation and made payable in France in francs, both of the parties to the notes resided in that country, the plaintiff in an action on the notes is entitled to recover, in dollars, the amount of the notes computed at the rate of exchange existing when the action was begun.

It was defendant's duty when sued to pay the amount of the notes in dollars, and he will not be permitted to take advantage of a change in the rate of exchange in his favor by withholding payment.

In the absence of proof to the contrary it will be presumed that the law of France is similar to our own, and therefore the loss from depreciation of French money is not an element of damage, the only damages recoverable for non-payment of the notes at maturity being interest.

TRIAL by the court without a jury under stipulation of the parties.

Sparks, Fuller & Stricker, for plaintiff.

Austin, McLanahan & Merritt, for defendant.



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SCUDDER, J. By the stipulation under which this case is heard defendant admits the second cause of action alleged in the complaint, and the sole issue to be determined by the court is the correct amount of the judgment.

On May 4, 1915, in Paris, France, plaintiff and defendant entered into a written agreement for the sale and purchase of certain shares of stock of a French corporation. At the time of the making of the agreement, plaintiff delivered to defendant 500 shares at the agreed price of 225,000 francs, and for this amount defendant delivered to plaintiff five notes due August 4, 1915.

These notes were not paid at maturity, and the admitted second cause of action alleged in the complaint is upon them. Except as to amount all of the notes read alike. The following is the translation of one of them:

"PARIS, the fourth of May, 1915. B. P. F. 50,000.

"On August fourth, nineteen fifteen, I shall pay against this note to Mr. Theodore Revillon, living in Paris, Theirs Street No. 4, the sum of fifty thousand francs in settlement of account.

"Note for fifty thousand francs.

"Rod A. Demme

"Paris, 11 Avenue de l'Opera." [Tax Stamp]

By the stipulation the question submitted to the court is the law of this state requires the amount of the judgment in dollars to be computed (1) at the par rate of exchange, or (2) at the rate of exchange at the maturity of the notes, namely, August 4, 1915, or (3) at the rate of exchange at the date of the commencement of the action, namely, May 21, 1920, or (4) at the rate of exchange at the date of trial

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and entry of the judgment, which by the stipulation shall be taken to be as November 16, 1920.

It is further stipulated that, for the purpose of decision and determination the par rate of exchange of the franc shall be taken to be 5.18 francs per dollar, that is 19.3 cents per franc, and that the rate of exchange on the several dates mentioned shall be taken to be as follows: "On August 4, 1915, 5.55 francs per dollar, that is 18 cents per franc; on May 21, 1920, 13.84 francs per dollar, that is 7.22 cents per franc, and on November 18, 1920, 17.10 francs per dollar, that is 5.84 cents per franc.

This case is not complicated by the fact that the parties at the time when the contract and notes were made were residents of different countries, and there is no room for controversy as to where the contract was made or where it was to be performed and the money paid.

Both parties to the contract resided in France, and the notes were given for the purchase price of the shares of a French corporation, and were made payable in France in the current money of that country. The facts of the case furnish no occasion for discussion of conflict of laws, or the laws governing bills of exchange, or the laws or customs of merchants. The case presented is that of a common debt contracted and payable in France.

It seems to me that the rule as to the measure of damages which should be applied in such case is, pay the creditor the exact sum which he ought to have received in France.

The application of this rule to the present case requires the court to render judgment for such sum of dollars as will be equivalent to the amount of principal and interest of the notes in francs computed either at the rate of exchange at the time of the com-

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mencement of the action or the rate at the time of judgment, and not at the par rate of exchange.

To compute the sum due at the par rate of exchange would be in effect to require defendant to pay in gold, although the notes were not made payable in gold. Plaintiff's loss in the transaction by reason of the depreciation in French money did not arise or result from defendant's breach of his contract in not paying the notes when they became due.

The general rule is that the *lex loci contractus,* and not the *lex fori,* governs questions as to the elements and amount of damages recoverable for a breach of contract. 12 C. J. 486. In this case, however, it is to be presumed, in absence of evidence to the contrary, that the law of France is similar to our own, and therefore under the French law the loss from the depreciation of the money of that country is not an element of the recoverable damages, and that the only damages that may be recovered for nonpayment of money is interest.

Plaintiff cites in support of his contention that the amount of the judgment in dollars should be computed at the par rate of exchange, the case of *Martin* v. *Franklin,* 4 Johns. 124, and cases in which that case has been followed in the lower courts of this state (*Scofield* v. *Day,* 20 Johns. 102; *Guiteman* v. *Davis,* 45 Barb. 576; *Swanson* v. *Cooke,* Id. 574; *Ladd* v. *Arkell,* 50 N. Y. Super. Ct. 150, 155; *Rice* v. *Ontario S. B. Co.,* 56 Barb. 387), and in the Massachusetts courts (*Adams* v. *Cordis,* 8 Pick. 260; *Alcock* v. *Hopkins,* 6 Cush. 484; *Lodge* v. *Spooner,* 8 Gray, 166; *Commonwealth* v. *Haupt,* 10 Allen, 38; *Burgess* v. *Alliance Ins. Co.,* Id. 221). The ruling of the court in *Martin* v. *Franklin, supra,* is sharply criticized by Judge Story in *Grant* v. *Healy,* 10 Fed. Cas. 978, and it does not seem to have received the approval of the Court of

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Appeals of this state in *Oliver Lee & Co.'s Bank* v. *Walbridge,* 19 N. Y. 136.

Neither the case of *Martin* v. *Franklin,* nor the other cases to which plaintiff refers, present a case like the one now before the court, where the place of residence of the parties, the place of making the contract and its performance are all in one country. These cases differ so materially from the case under consideration that an extended consideration of them seems unnecessary.

As between the rate of exchange at the commencement of the action and the rate of exchange at the time of judgment, it seems to me that the rate at the commencement of the action is the proper rate to be employed in computing the amount of the judgment.

The notes became payable in dollars upon plaintiff's demanding of defendant their payment in this state. The commencement of the action was equivalent to such a demand. The amount due in dollars depended upon the rate of exchange existing at the time of the demand or, in this case, the commencement of the action. Under the law of this state it was the defendant's duty forthwith upon demand to pay the amount in dollars, and he should not be permitted to take advantage of a change in the rate of exchange in his favor by withholding payment.

Plaintiff is entitled to interest at six per cent from August 4, 1915, the date when the notes became due, to November 16, 1920, the stipulated date on which judgment is to be regarded as entered, and to have the aggregate sum of principal and interest in francs converted into dollars at the rate of exchange on May 21, 1920, the date of the commencement of the action, namely 13.84 francs per dollar.

Judgment for plaintiff for $21,409.14.

Judgment for plaintiff.

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MICHAEL PARUCKI and JOSEFINA PARUCKI, Respondents, v. THE POLISH NATIONAL CATHOLIC CHURCH OF THE HOLY MOTHER OF THE ROSARY, Appellant.

(Supreme Court, Erie Special Term, December, 1920.)

**Negotiable instruments — lack of authority in officers of a religious corporation to issue notes — evidence.**

A business act of a religious corporation must be shown to have been duly authorized before any liability therefor will attach.

A promissory note purporting to have been made by a religious corporation organized under the Laws of 1813 can only be authorized at a meeting of five of the nine trustees which the corporation was authorized to elect each year.

Proof that such a note was signed by the president, secretary and treasurer of the corporation does not show that it is the note of the corporation without proof that it was made by its authority. The fact that not all of the nine trustees were acting as such when the note was made does not change the requirement that five trustees were necessary to constitute a quorum.

The evidence in an action on the note being insufficient to support a finding that it was authorized by the board of trustees, and the record on appeal from a judgment in favor of plaintiff not showing that defendant received the money represented by the note, and that the corporation by its board of trustees never admitted its liability thereon, the judgment appealed from will be reversed and a new trial ordered.

APPEAL from a judgment of the City Court of Buffalo rendered in favor of plaintiffs.

Henry Adsit Bull, for appellant.

Alfred L. Harrison, for respondents.

LAING, J. This is an appeal from a judgment of the City Court of Buffalo rendered on July 30, 1920, for $1,252.80, recovered on a promissory note purporting

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to have been given by the defendant to the plaintiffs, dated November 2, 1909, for $700.

The prior judgment in favor of the plaintiffs was reversed by this court. *Parucki* v. *Polish National Catholic Church of the Holy Mother of the Rosary,* 177 N. Y. Supp. 206.

The note was signed by the president, secretary and treasurer of the defendant. On the Thursday evening preceding the date of the note, at the usual time and place of holding meetings by the trustees of the defendant, at least four trustees met, and then and there the action was taken which the plaintiffs contend authorized the giving of this note.

On the former appeal it was assumed that five trustees met at this time, but it was held that no action was taken by them as a board, and hence that the note was not authorized.

The evidence on this trial discloses more fully the action taken at this meeting, and the trial judge, I think rightly, concluded that the trustees did act as a board in such a way as to make their action valid.

The question, however, is now presented as to whether or not there was at this time a quorum of trustees. The defendant was incorporated as a religious corporation under the Laws of 1813, and the number of its trustees authorized, and each year elected, was nine. The record does not show clearly the number of trustees in October and November, 1909, but it does indicate that not all the trustees were then acting, for the reason that at that time there was a division in the church. The evidence upon the former trial as to the number of trustees at this particular meeting was: "Q. Who was present at that meeting? A. Simon Zacholski, Frank Borowiak, Bishop Kaminski; I think Ignatz Gliczinski was there. I could not say, I think he was there. Q. Were you there? A. Yes, sir."

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This evidence was repeated upon the second trial and the same witness also testifies as follows: "Q. There was present at the meeting Simon Zacholski? A. Simon Zacholski was there. Q. Anybody else? A. The secretary and Bishop Kaminski. Q. Anybody else? A. The treasurer, Joseph Siejak. Q. Anybody else? A. Frank Borowski. Q. Was Ignatz there? A. I didn't see him that time. Q. This Simon Zacholski was president? A. Yes * * *. The Court: Q. How many were there at that meeting? Mr. Harrison: A. Four. Bishop Kaminski, Zacholski, Siejak and Borowiak. Mr. Harrison: Q. Do you know positively what people were there that night, and, if so, who were they? A. Bishop Kaminski, Simon Zacholski, Joseph Siejak, Frank Borowiak. Mr. Harrison: Q. In your last testimony you said that Ignatz might have been there. Was he or was he not? A. I cannot say for positive whether he was or not."

The evidence on the former trial probably permitted a finding that five trustees were present at this meeting. That finding cannot be made upon the record now before the court. The trial judge apparently assumed that the evidence on the second trial was not different from that given on the previous trial. Hence the question as to whether or not there was a quorum of trustees at this meeting was not discussed by him. The question however is necessarily involved in this appeal. This note could be authorized only at a meeting of five trustees. No question of notice of the meeting is involved. The meeting was at the usual place and at the usual time. Those facts however did not permit action unless a quorum was present at the meeting.

The General Corporation Law (§ 34) provides that "a majority of the board of directors of a corporation at a meeting duly assembled shall be necessary to con-

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stitute a quorum for the transaction of business." The decisions are in accord with this rule. *Moore* v. *St. Thomas Church,* 4 Abb. N. C. 51; *Ex parte Willocks,* 7 Cow. 402; *Round Lake Assn.* v. *Kellogg,* 20 N. Y. Supp. 261; affd., 141 N. Y. 348; *Erie R. R. Co.* v. *City of Buffalo,* 180 id. 197; Cook Corp. § 713A.

The fact that not all of the nine trustees were acting as such did not change the requirement that five were necessary to constitute a quorum. A majority of the legal number is required to hold a meeting. *Moore* v. *St. Thomas Church,* 4 Abb. N. C. 51; *Ex parte Willocks,* 7 Cow. 402; *Round Lake Assn.* v. *Kellogg,* 20 N. Y. Supp. 261; *Erie R. R. Co.* v. *City of Buffalo,* 180 N. Y. 197; 10 Cyc. 329; Thomp. Corp. (Ed. 1895) § 3917; Cook Corp. § 713A.

The fact that this note was signed as it was does not make its issuance the act of the defendant. Proof that a promissory note purporting to be made by a corporation was signed by its president and secretary does not show that it is the note of the corporation without proof that it was made by its authority. *Peoples Bank* v. *St. Anthony's R. C. Church,* 109 N. Y. 512. Even if it be held that such proof would be *prima facie* evidence that the note was authorized, such a holding would not avail here because full proof was made by the plaintiffs as to how and why the note was given. The general rule is that a recovery cannot be had against either a religious or business corporation, on commercial paper, unless the evidence warrants a finding, not only that the paper was issued by officers of the corporation but that its issuance was authorized by the by-laws, or by resolution of the board of directors, or by a course of dealing by which the corporation held them out as authorized to issue it, and would be deemed estopped from questioning their authority, or of ratification by the acceptance

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and retention of some benefit or advantage from the unauthorized act or otherwise. *Miners & Merchants' Bank* v. *Ardsley Hall Co.*, 113 App. Div. 194. As to a religious or other corporation not engaged in business, a business act which charges them with liability must be shown to have been authorized before the liability will attach. *Karsch* v. *Pottier & S. Mfg. & Imp. Co.*, 82 App. Div. 230, 233; *Miners & Merchants' Bank* v. *Ardsley Hall Co.*, 113 id. 194; *Kelley* v. *St. Michaels R. C. Church*, 148 id. 707. Proof that the defendant received the money represented by this note might entitle the plaintiffs to recover under the authority of *Wilson* v. *Tabernacle Baptist Church*, 28 Misc. Rep. 268. There is evidence that this money was borrowed to pay the interest on the defendant's mortgage, and that Bishop Kaminski announced in church meetings that this note was one of the defendant's obligations. This evidence does not show that the $700 was used to pay the interest on the church mortgage, nor does the announcement in a church meeting that this note was a church obligation and the acquiescence of the congregation constitute a ratification. Neither the priest nor the congregation represented the defendant in a business transaction. The board of trustees, acting as a board, alone could bind the defendant by a contract or by an admission.

Having reached the conclusion that the evidence does not support a finding that the note in suit was authorized by the board of trustees, and that there is no evidence in the record that the defendant received the money represented by the note and that the defendant by its board of trustees never admitted its liability to pay the note, it necessarily follows that the judgment appealed from must be reversed, and a new trial ordered, costs to abide the event.

Judgment reversed and new trial ordered, costs to abide event.

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CLARENCE M. WOOLLEY, ROLAND J. HAMILTON and FRANK M. PETERS, as Executors and Trustees under the Last Will and Testament of JOHN B. PIERCE, Deceased, Plaintiffs, *v.* CARRIE ELEANOR HUTCHINS et al., Defendants.

(Supreme Court, Erie Trial Term, December, 1920.)

**Wills — construction of — how validity of a testamentary disposition of real estate in this state by a non-resident testator is controlled — trusts — suspension of power of alienation — corporations — power of sale — annuities — devise — vesting — gifts — Decedent Estate Law, §§ 44, 45, 47 — Real Property Law, §§ 42, 61, 97, 99 — Code Civ. Pro. § 1836-a.**

The validity of a testamentary disposition of real estate in this state by a non-resident testator is controlled by section 47 of the Decedent Estate Law. (P. 13.)

By a trust created by the will of a non-resident testator who left very little property other than common and preferred stock in a corporation and certain unproductive real estate in this state of the value of $150,000, there was given outright to certain designated employees of the corporation, divided into classes, the amount of property which the testator intended they should receive at his death, with a *proviso* that the right of any employee to participate in the distribution of the principal, which was not to be made until after the lapse of ten years even though the three life beneficiaries died long prior thereto, was contingent upon such employees remaining in good standing in the active employment of the company, its successors and assigns, until the expiration of the trust period. It was further provided that in default of such continued employment, the benefit intended for such employees should end and "be treated as if never conferred" and the testator left it entirely to the officers of the corporation to terminate the employment of any employee and made the action of said officers with respect thereto as final and conclusive as a voluntary relinquishment of employment. The trustees, being unable to dispose of the real estate, a part of the residuary estate, because prospective pur-

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chasers question whether those represented by the trustees take the real estate, and whether if the heirs of testator take the remainder, the trustees have power to sell the real estate, bring this action under section 1836-a of the Code of Civil Procedure and sections 44 and 45 of the Decedent Estate Law against the heirs of testator, his widow and his former wife for a construction of the will, and it is conceded that the trust is void under the statute (Real Property Law, §§ 42, 61) providing against the suspension of the power of alienation for a longer period than two lives in being and forbidding the accumulation of rents and profits save as authorized by law. *Held:*

That the remainder did not vest in the remaindermen on the death of the testator but that their interests were contingent, and as to the principal were intended to vest only at the expiration of the trust period, provided that in the meantime they remained in the active employment of the company and in good standing, and that to delete the invalid provisions of the will and declare that the remainder vested in the employees immediately upon the death of the testator would be in effect to make a new will. (P. 25.)

The case held to come within the rule that where there is not a direct devise or bequest to remaindermen but merely a direction to executors or trustees to pay over to or divide among a class at a future time, the vesting does not take place until the arrival of that time, and the gift is contingent upon survivorship and futurity is annexed thereto. (Id.)

The heirs of the testator took the real estate subject to charges thereon for the payment of an annuity to the first wife of testator, to the payment of his debts and funeral expenses and inheritance taxes and any other public or governmental charges and to the payment of money legacies given by the will if needed therefor, and also subject to the exercise of the power of sale conferred upon the executors and trustees for any authorized purpose. (Pp. 26, 27.)

While the attempt of testator to confer authority upon his executors and trustees to sell the real estate for the purposes of the invalid trust falls with it, yet if a sale of the real estate be necessary to render effectual any of the valid provisions of the will or to enable the executors and trustees to perform any of their duties, they are authorized to sell under the power of sale, which under sections 97 and 99 of the Real Property Law is valid as a power in trust. (Pp. 27, 28.)

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ACTION for the construction of a will.

Sullivan & Cromwell (Royall Victor, John W. Van Allen, Ralph Royall and Miner W. Tuttle, of counsel), for plaintiffs.

Satterlee, Canfield & Stone (George F. Canfield, of counsel), for defendants Fostena Dickey, Walter Berry, Lester Berry, Leslie Berry, Linwood Berry and Gladys Berry.

Henry Warren Beebe, for Adelaide Leonard Pierce.

LAUGHLIN, J. This is an action brought by the executors of and trustees under the last will and testament of John B. Pierce, deceased, for the construction of this will. The testator died on the 23d day of June, 1917, a resident of the state of Massachusetts, leaving a last will and testament duly executed on the 15th day of December, 1913, and a codicil thereto duly executed on the 19th day of May, 1916. The will was duly admitted to probate in Massachusetts, and it is conceded that all of its provisions are valid under the laws of that state. The testator left unproductive real estate in the state of New York of the value of about $150,000, the validity of the disposition of which is controlled by the laws of this state. Decedent Estate Law, § 47; *Hobson* v. *Hale*, 95 N. Y. 588. By paragraph I of the will, the testator directed that his debts, funeral expenses and every inheritance and governmental charge be paid out of his residuary estate, described in paragraph XVII. By paragraph II he disposed of certain personal property and real estate in Massachusetts. By paragraphs III–XVI, inclusive, with the exceptions of paragraphs X–XII, he gave certain cash legacies in common and preferred stock of the American Radiator Company

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to his wife, to his two half-sisters, to an aunt, to five friends, to twenty-one friends and relatives, and to designated employees of the American Radiator Company. By paragraph X he gave his mining claims and property in Alaska, and debts owing to him there to a business associate. By paragraph XI he gave to his first wife, Mary A. Pierce, from whom he was legally separated, a house and lot occupied by her in California, and a cash legacy of $300 per month for life, and directed his trustees to make provision therefor from his residuary estate. In paragraph XII he set forth his reasons for the gifts of the common and preferred stock of the radiator company contained in paragraphs XIII–XVI, and for the provisions specified in paragraph XVII in their behalf provided that they should be living at the expiration of the trust period of ten years therein specified, or upon the death thereafter of the last survivor of his two half-sisters and his wife should they, or any of them, be living at the expiration of the trust period. Those reasons are stated to be that his business career had been almost wholly identified with the manufacture and sale of heating apparatus and appliances and that the growth of the business had been gradual, owing to his limited means at the outset, but that by application and perseverance it grew and prospered until the organization of the first company in 1892, since which time it has been largely augmented, and that this was due largely to the fine sense of honor, high quality of integrity and conscientious and loyal devotion to the performance of duty by his business associates and to the development in the business organization of a splendid spirit of co-operation in its various departments and among its employees until it steadily advanced the business operations of the company throughout this and foreign countries, and that grate-

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fully paying tribute to his co-workers he further manifested his appreciation by providing tangible benefit to many of them out of the estate which they had helped to expand and that as the largest part of his residuary estate will consist of capital stock of the radiator company he felt that by having mutuality of interest between his wife and the beneficiary employees of the company he would the more completely secure to her the continuance of a large yearly income sufficient for all her possible requirements. By paragraph XIII he gave to each of eight named employees of the company, provided at his death they should be in the active employ of the company, thirty-two shares of the common stock, and described them as participants in Benefit A. By paragraphs XIV–XVI he gave on the same condition, respectively, to forty other named employees sixteen shares each of the common stock, to sixty-one other named employees, eight shares each of the common stock, and to three hundred and nineteen other named employees, four each of the common stock, and described them as participants in "Benefit B, Benefit C and Benefit D." By paragraph XVII, as amended by the codicil, he gave all the rest and residue of his property of every name and description, wheresoever situate, to his trustees, as follows: "* * * to hold, manage, control, invest, dispose of and reinvest, as often as to them as may seem desirable, in order to keep the same as productive as may be and upon the further trusts to hold my estate for income and accumulation for the period of 10 years from and after my death and thereafter until each of my two half-sisters, Ellie P. Watts and Mary B. Richardson, and also my wife, Adelaide Leonard Pierce, have died. In the meantime and until the expiration of aforesaid ten year period or until the decease of my said two half-sisters, Ellie P. Watts and

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Mary B. Richardson, and of my said wife, Adelaide Leonard Pierce, to divide and distribute the income of said trust estate as hereinafter provided, and finally upon the death of my two half-sisters, Ellie P. Watts and Mary B. Richardson, and my said wife, Adelaide Leonard Pierce, or at the end of the aforesaid ten year period in case this should extend beyond all of said three lives, to divide and distribute, subject to the provisions of paragraph 'XI,' the principal of said trust estate in manner hereinafter outlined."

By paragraph XVIII he gave the trustees power to collect rents, income, dividends and profits arising from the trust estate and to sell his real estate at public or private sale and to subdivide it into lots, and this power was also conferred with respect to real estate *purchased* by the trustees, and power to lay out streets and to improve real estate, and to lease it, and to buy or sell real estate or to change realty into personalty, and personalty into realty, and to invest and reinvest the proceeds in realty and personalty; and he gave them power to administer and manage the trust estate the same as he might have administered and managed it, and to exercise their power without obtaining authority from any court. He states in paragraph XIX that besides the income for his wife and half sisters he shall in the succeeding paragraph make provisions for income from and create participating interests in the final distribution of the residuary estate for the considerable number of the radiator company and that those whom he desired to participate therein "are the employes who at the time of my death will be rightful legatees" under paragraphs XIII to XVI inclusive, subject to later defeasance for either of the limitations or conditions imposed by that which follows: and he then classifies them, designates them as "Benefit A, B, C & D em-

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ployes " the same as they are classified in the said last mentioned paragraphs of the will. It is then stated that wherever any benefit is provided for or conferred upon any employee of the radiator company, " * * * which is to issue from and out of the residuary estate, it will be understood that the beginning of as well as the continuation of the enjoyment of such benefit will be contingent upon such employe remaining in good standing, to do which it will be necessary, first, that he or she survives me, second, that he or she survives the period when any particular share of such benefit will mature for him or her and, third, that he or she continues in the active employ of said American Radiator Company, its successors or assigns, until the maturity of any particular accruing share of the benefit in his or her favor meaning and intending, that no ' Benefit A ' employe, no ' Benefit B ' employe, no ' Benefit C ' employe and no ' Benefit D ' employe, whom I have named or may hereafter designate can be regarded as in good standing excepting so long as he or she meets all the aforesaid conditions. Upon the failure of either of which the benefit shall from that instant end, and pro tanto be treated as if never conferred. The termination of employment with said American Radiator Company if enforced by the officers of said Company shall be conclusive, final and without right of appeal and will operate with like effect as the voluntary leaving the employ of the Company."

By paragraph XX he directed that out of the net income of the trust estate the trustees pay quarterly of each year thirty per cent to his wife, five per cent to each of his half-sisters and that the remaining sixty per cent should constitute a fund which he styled " employees fund," and subject to the limitations of paragraph XXXII he directed that it be distributed



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among the four classes of employees who should be in good standing at the particular period for disbursement in such manner that the members of class " A " should receive eight-fifteenths; of class " B " four-fifteenths; of class " C " two-fifteenths, and of class " D " one-fifteenth. In that paragraph he also provided that on the termination of any of the three life interests of his wife and half sisters the share of income for such interest should fall into and become a part of the employees' fund from which disbursements were to be made to the beneficiary employees in good standing, and that when all three of the life interests should have terminated then the period for final distribution to the employees " will have arrived, unless it be in abeyance for the unexpired portion of the ten year period mentioned in paragraph XVII." By paragraph XXXI he provided that when the time for distribution arrived under paragraph XVII the trust estate should be divided subject to the limitations of paragraph XXXII and of the provisions of paragraph XI.

" * * * among the employees in good standing, who are then members of Benefits A, B, C and D, in the same proportions laid down by me for the division of income, namely, each member of ' Benefit A ' is to receive 8 times as much as any member of ' Benefit D,' or 4 times as much as any member of ' Benefit C ' or twice as much as any member of ' Benefit B.' Each member of ' Benefit B ' is to receive four times as much as any member of ' Benefit D,' or twice as much as any member of ' Benefit C,' or one-half as much as any member of ' Benefit A.' Each member of ' Benefit C ' is to receive twice as much as any member of ' Benefit D,' or one-half as much as any member of ' Benefit B ' or one-fourth as much as any member of ' Benefit A.' Each member of ' Benefit D ' is to

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receive one-half as much as any member of 'Benefit C,' or one-fourth as much as any member of 'Benefit B,' or one-eighth as much as any member of 'Benefit A.'" That paragraph further provides:

"Realizing the possibility that all the members of one or more of said four classes or benefits may in consequence of death, resignation or otherwise, cease to remain in good standing at some one of the future periods for distribution of income or be so at the time set for final division, I will add another illustration, intended not to show a different method of division for it will be identical with the one heretofore laid down by me in connection with the division of income, but given solely in demonstration of the rule's application under conditions similar to those described for the purpose of example in the following:

"Five Members of 'Benefit A.'

"Twenty Members of 'Benefit C.'

"Forty Members of 'Benefit D.'"

Further assuming that the value of the estate for distribution is $120,000, the division would result in the following:

| | Total |
|---|---|
| Each of the 5 members of 'Benefit A' would receive $8,000 | $40,000 |
| Each of the 20 members of 'Benefit C' would receive $2,000 | 40,000 |
| Each of the 40 members of 'Benefit D' would receive $1,000 | 40,000 |
| | $120,000 |

"It will be apparent that the foregoing illustration applies equally well in the case of division of income as in the instance of final distribution."

By paragraph XXXII as amended by the codicil

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he limited the amount of annual income and the amount on final distribution which any member of any class should receive. By paragraph XXXIII added by the codicil he directed that the trustees, in case there should be a surplus of income owing to the limitation on the distributions thereof contained in paragraph XXXII should form the " John B. Pierce Foundation " and he specified what the object and purpose thereof should be and provided that any surplus of the corpus of the trust caused by the limitations with respect to the distribution thereof should go to the said foundation. These are the only provisions of the will deemed by any of the parties to be material to the points presented for decision.

It is conceded that the trust is void under our statutes providing against the suspension of the power of alienation for a longer period than two lives in being and forbidding the accumulation of rents and profits save as authorized (1 R. S. §§ 14, 15; Real Prop. Law, art. 3, §§ 42, 61), for the reason that in so far as it fixes the period at ten years for its continuance it is not limited on two lives in being (*Hone's Exrs.* v. *Van Schaick,* 20 Wend. 564; *Haynes* v. *Sherman,* 117 N. Y. 433) and in so far as limited to the lives of three persons specified it suspends the absolute power of alienation, and suspends the vesting of title absolute for more than two lives in being.

The trustees are unable to dispose of the real property situate in this state for the reason that prospective purchasers question whether those whom the trustees represent take the real estate, which owing to the sufficiency of the personal property to pay the cash legacies is part of the residuary estate, and whether, if the heirs of the testator take the remainder, the trustees have power to sell the real estate. The real estate is situate in the counties of Erie and Niag-

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ara, and the plaintiffs have filed in the offices of the clerks of these counties exemplified copies of the will and probate proceedings in Massachusetts. The trustees have brought the action on the authority of *Monypeny* v. *Monypeny*, 202 N. Y. 90, and section 1836a of the Code of Civil Procedure and sections 44 and 45 of the Decedent Estate Law against all the heirs of the testator and his widow and his former wife. The heirs who have appeared claim that paragraphs XVII–XX, XXIII and XXVII in so far as they affect the real estate in this state are void, and that with respect to such real estate the testator died intestate and his heirs inherited it. The answer of the widow of the testator admits all the allegations of the complaint and she joins with the plaintiffs in the prayer for relief. The income derived from all the property has never been sufficient to produce an excess of income beyond the maximum amount which under the will and codicil the employees of the different classes were to receive and the John B. Pierce Foundation has never been formed. The testator had no dependents or relatives in whom he was specially interested excepting his widow, his former wife and his two half-sisters, who were of about his age and children of his mother by a second marriage. His other relatives were descendants of children of his father by a marriage prior to that with his mother, and with a few exceptions he merely knew of their existence. The learned counsel for the plaintiffs and for the widow of the testator contend that under the authority of many recent decisions of the Court of Appeals and of the Appellate Division the invalid provisions of the will with respect to the trust may be deleted and that the remainder should be deemed to have vested upon the death of the testator in the four classes of employees who, if living and in good standing in the

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service of the company at the termination of the void trust were to take on the theory that it plainly appears from the provisions of the will that the testator was primarily interested in their taking the property. To apply the rule to the case at bar would be carrying it far beyond any of the authorities. It is a rule that has been adopted to avoid intestacy in whole or in part, but it is only applied where it is consistent with the testamentary plan and scheme of the testator as shown by the will and ordinarily its application is confined to wills whereby the remaindermen who were to take at the expiration of the period of the invalid trust are definitely specified and nothing remains for them to do after the death of the testator as a condition entitling them to take and where the trust may be said to be collateral to the desire of the testator that the remaindermen should take. *Kalish* v. *Kalish*, 166 N. Y. 368; *Matter of Hitchcock*, 222 id. 57; *Matter of Colgrove*, 221 id. 455; *Matter of Berry*, 154 App. Div. 509; affd., 209 N. Y. 540; *Matter of Thaw*, 182 App. Div. 368; *Chastain* v. *Tilford*, 201 N. Y. 338; *Hascall* v. *King*, 162 id. 134; *Brinkerhoff* v. *Seabury*, 137 App. Div. 916; affd., 201 N. Y. 559; *Smith* v. *Chesebrough*, 176 id. 317; *Matter of Butterfield*, 133 id. 473. In the case at bar, however, the testator gave outright upon his death to these classes of employees the amount of property which he intended they should then receive and various provisions of the will clearly show that he did not intend that they should participate in the remainder unless they continued in the service of the company in good standing until the time for distribution arrived; and the only apparent purpose of the ten-year period was as a probationary period. Final distribution was not to be made until the lapse of ten years, even though the three life beneficiaries died long prior thereto. It is argued that the ten year trust period was for the

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*convenience* of the estate and the plaintiffs; but that cannot be for the testator had very little property other than common and preferred stock in the radiator company. I appreciate, of course, that the remaindermen although divided into classes are all named; but while if the remainders were vested in them we might accelerate the vesting in possessions, I think that rule may not be applied where the application might enable remaindermen to take who were not certain of taking ultimately under the will as drafted. I am of opinion, therefore, that to delete the invalid provisions of the will and declare that the remainder vested in these employees immediately upon the death of the testator would in effect be making a new will for it is wholly problematical as to whether the testator, if he thought these provisions were invalid, would have given the different classes of employees the entire remainder or any part of it. Moreover it will be seen that the provisions of paragraph XVII as amended by the codicil, which are the only provisions under which the different classes of employees can claim as remaindermen, are a direction "to divide and distribute, subject to the provisions of Paragraph XI," which relates to the annuity of the former wife of the testator. The principal of the trust estate he directs shall be divided and distributed "in manner hereinafter outlined," referring to paragraph XXXII, which places a specific limitation on the amount to be paid over to each of the employees of the different classes. It will thus be seen that the testator did not intend that these remaindermen *in any and all events* should take the entire principal of the trust estate and he expressly provided in paragraph XXXIII, added by the codicil, that any surplus of the principal of the trust estate left after paying to each remainderman the maximum amount specified in paragraph XXXII as amended by the

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codicil should be paid over to the "John B. Pierce Foundation." In these circumstances the court, I think, is not warranted in deleting all these provisions with respect to the trust and declaring that the remaindermen took the entire principal precisely the same as if the testator had included it in the other absolute legacies to them immediately on his death. The learned counsel for the plaintiffs contend that the will should be construed as vesting the entire remainder which the testator intended as a trust estate in the remaindermen subject only to be divested as to any of them dying before the period for distribution or failing to remain an employee in good standing until such period. I think that is not the true construction of the will. It must be borne in mind that by paragraph XIX hereinbefore quoted the testator provided that the right of any employee to participate in the distribution of the principal was contingent upon such employee remaining in good standing as an employee and continuing in the active employment of the radiator company, its successors or assigns, until by the expiration of the trust period the period for division and distribution should arise and he therein expressly provided that in default of that the benefit intended for such employee should end and "be treated as if never conferred" and he left it entirely to the officers of the radiator company to terminate the employment of any employee and made their action with respect thereto as final and conclusive as a voluntary relinquishment of the employment of the employee; and it is also to be borne in mind that the testator attempted to vest the title to the trust estate in the trustee during the period of the trust with full authority to sell and convey and to invest and to reinvest and on that theory the absolute power of alienation would not have been suspended. *Robert* v. *Corn-*

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*ing,* 89 N. Y. 225, 235. In these circumstances I am of opinion that the remainder did not vest in the remaindermen on the death of the testator but that their interests were contingent and as to the principal were intended to vest only at the expiration of the period of the trust provided that in the meantime they remained in the active employment of the company and in good standing. The case, I think, fairly falls within the rule that where there is not a direct devise or bequest to remaindermen but merely a direction to executors or trustees to pay over to or divide among a class at a future time the vesting does not take place until the arrival of that time and the gift is contingent upon survivorship and futurity is annexed thereto. *Warner* v. *Durant,* 76 N. Y. 133; *Delafield* v. *Shipman,* 103 id. 463; *Dougherty* v. *Thompson,* 167 id. 472; *Davis* v. *MacMahon,* 161 App. Div. 458; affd., 214 N. Y. 614; *Hennessy* v. *Patterson,* 85 id. 91; *Booth* v. *Baptist Church,* 126 id. 215. If the testator had given the *entire* remainder to the remaindermen and it were certain that identically the same remaindermen would take at the expiration of the trust period as if the gift to them were at the death of the testator then the invalid trust might be deleted, but here even if it could be held that the remainder vested in these various employees upon the death of the testator it was subject to be divested by death, resignation or discharge from the employ of the company prior to the time when under any theory of construction it is clear that the testator intended it should vest in them in possession. *Davis* v. *MacMahon, supra; Booth* v. *Baptist Church, supra; Cochrane* v. *Schell,* 140 N. Y. 516; *Knox* v. *Jones,* 47 id. 389. See, also, *Matter of Butterfield, supra.* The learned counsel for the heirs contends that a gift of a remainder which is vested but limited to take effect at the expiration of an invalid

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trust is void and he cites therefore *Knox* v. *Jones, supra; Matter of Wilcox,* 194 N. Y. 288, but he concedes that those authorities are apparently in conflict with *Matter of Berry,* 154 App. Div. 509; affd., 209 N. Y. 540, and he endeavors to reconcile *Matter of Berry, supra,* with the former decisions on the ground that the remainderman in that case was a charitable corporation. I think the earlier rule has been modified by *Matter of Berry* to the extent that where the remaindermen are definitely fixed and would necessarily be the same at the expiration of a void trust as at the time of the death of the testator then the void trust may be deleted and the remaindermen be permitted to take in instanter, but that it is not this case for here the remainders were, I think, contingent and it cannot be said that the remaindermen would be the same at the time the testator intended they should take as at the time of his death and therefore they may not be permitted to take by deleting the invalid provisions. *Brinkerhoff* v. *Seabury, supra.* Manifestly the primary purpose of the testator in creating the invalid trust was either to put the employees who were to become remaindermen on probation or for the benefit of his widow and two half-sisters. If for the benefit of the latter then such primary purpose may not be disregarded and the disposition of principal as well as income would be void; if as I think his primary purpose was to insure the continuance of the remaindermen as faithful employees then too I think such primary purpose may not be disregarded and the employees should not be permitted to take as if they had complied with the conditions imposed on them by the testator throughout the trust period. I am, therefore, of opinion that the heirs take the real estate of the testator situate in the state of New York subject to the charges thereon for the payment of the annuity

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to the first wife of the testator and to the payment of the debts of the testator and funeral expenses and the inheritance taxes and any other public or governmental charges and subject to the payment of the cash legacies given by the will if needed therefor.

The remaining question is as to whether the trustees have a valid power of sale under which they may convey good title to the real estate. It was competent for the testator if he saw fit to devise his real property to his executors and trustees for the purpose of sale and that would be valid as a power to sell even though he did not by the will dispose of the remainder left after the payment of his debts and funeral expenses or other charges and where he creates an invalid express trust and directs or authorizes his executors or trustees to perform an act which may be lawfully performed under a power such as to sell his real estate the trust is valid as a power in trust. Real Prop. Law, §§ 97, 99. The provisions of the will are, I think, sufficiently broad to authorize the executors and trustees to sell the real estate of the testator even though the provisions with respect to the use and disposition thereof in so far as it concerns the trust may be invalid. It is not material to the heirs whether the executors and trustees are empowered to sell the real estate for they will be accountable to the heirs for the proceeds thereof and doubtless it would be much more convenient to have the sale made by them than by the heirs who are numerous and scattered throughout the country. In so far as the testator attempted to devise the real estate here to the executors and trustees in trust with authority to sell in order to carry out the purposes of the invalid trust no title to the trust estate passed to the executors and trustees and the attempt to confer authority on them to sell the real estate for the purposes of the invalid trust falls with the trust. *Bene-*

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*dict* v. *Webb,* 98 N. Y. 460; *Garvey* v. *McDevitt,* 72 id. 556; *Brewer* v. *Brewer,* 11 Hun, 147; affd., 72 N. Y. 603; *Haynes* v. *Sherman,* 117 id. 433; *Dana* v. *Murray,* 122 id. 604; *Allen* v. *Allen,* 149 id. 280. In *Chamberlain* v. *Taylor,* 105 N. Y. 184–194, it is stated that the doctrine of equitable conversion only applies to property validly devised, but it was at least assumed in *Hobson* v. *Hale,* 95 id. 588, 607, that it may obtain where there has been no valid disposition of the property by the will.

If, however, a sale of the real estate in question be necessary to render effectual any of the valid provisions of the will or to enable the executors and trustees to perform any of their duties, then, I think, they would be authorized to sell under the power of sale. *Chamberlain* v. *Taylor, supra; Asche* v. *Asche,* 113 N. Y. 322. No actual necessity for a sale for the payment of debts or funeral expenses or legacies has been shown; but it appears that ancillary letters were duly issued to the executors and trustees by the Surrogate's Court of Erie county, and that a proceeding was duly instituted to determine the amount of the transfer tax on the real estate in question and that the amount thereof was duly determined and assessed, and it thereupon became the duty of the executors and trustees to pay it and they did so prior to the commencement of this action. I am of opinion that it was their duty under the will to pay the transfer tax and that for that purpose they were authorized by the power of sale contained in the will to sell the real estate or any part thereof. The transfer taxes were liens on the real estate and equity requires that the plaintiff as against the heirs be subrogated to the lien of the state. Title to the real estate not having passed under the will, but having vested in the heirs subject to the exercise of the power of sale for any authorized pur-

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pose, the proceeds of such a sale not required for the purpose for which the sale was made would necessarily still be deemed realty, and the title of the heirs would remain unaffected by such a sale excepting by being transferred from the land to the proceeds of the sale. It appears that the plaintiffs in good faith took charge of this real estate under the will and have collected rents, kept buildings in repair and paid all taxes, insurance and other charges against the same. In so doing they have expended from the funds of the estate many thousand dollars more than they have received. No heir has questioned their authority and control over this real estate and it is reasonably to be inferred that all the heirs have acquiesced therein. In the circumstances the heirs should be deemed estopped from claiming that such expenditures were voluntarily made by the plaintiffs and without authority under the will.

A decree may be prepared construing the will and power of sale in accordance with these views and adjudging that the plaintiffs are authorized under the power of sale to sell the real estate and reimburse the estate for all expenditures so made for transfer taxes, and in managing the real estate in question, together with interest thereon and for the payment of all costs and allowances to be authorized and allowed by the decree to be settled on notice, and authorizing a sale of the real estate in question by the plaintiffs as such executors and trustees in separate parcels to the extent necessary to satisfy the lien for the transfer tax and the lien in their favor which will be given by the decree for their expenses and disbursements in handling the real estate and the costs and allowances that will be provided for in the decree.

Judgment accordingly.

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PRAKSYDA RZEPECKA, Plaintiff, *v.* MICHAEL URBANOWSKI, Defendant.

(Supreme Court, Erie Equity Term, December, 1920.)

**Adjoining owners — establishing title — when lot owner cannot take forcible possession of a disputed strip of land — deeds — injunctions — ejectment — Code Civ. Pro. § 968.**

A lot owner, except by virtue of a judgment in a proper action establishing his title, cannot take forcible possession of a disputed strip of land claimed by an adjoining lot owner.

Where in an action between adjoining lot owners on a city block to determine the title to a strip of land to which plaintiff claims title by adverse possession, it appears that the properties of both parties are about two feet off the line as given in their respective deeds, a permanent injunction will be granted restraining the defendant from moving a building onto the disputed strip after he had torn down the division line fence.

The remedy of the defendant is an action of ejectment in which, under section 968 of the Code of Civil Procedure, he, as plaintiff, would have the right to have the issues framed tried by a jury.

ACTION to establish title to real property.

Henry W. Brush, for plaintiff.

E. D. Vincent, for defendant.

WHEELER, J. The parties to this action own adjoining lots fronting on Detroit street in the city of Buffalo. It would appear from the testimony of surveyors that the properties of practically all the lot owners in the block in question as actually occupied by them, do not correspond to the record descriptions contained in their deeds, but are about two feet off their true line. This seems to be the case with the

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plaintiff's lot. Nevertheless, the plaintiff contends that she and her grantors have occupied the premises in question under claim of title for upwards of twenty years, and have thereby acquired title by adverse possession.

There has stood on the line purporting to divide the properties of the plaintiff and defendant, a fence. Shortly prior to the commencement of this action the evidence shows the defendant tore this division fence down, and started to move a building upon the disputed strip. Whereupon the plaintiff procured a preliminary injunction against the defendant so doing, and on this trial asks for a permanent injunction restraining such threatened action on the part of the defendant.

We think the plaintiff entitled to the judgment asked.

Section 2233 of the Code of Civil Procedure provides: "An entry shall not be made into real property, but in a case where entry is given by law; and, in such a case, only in a peaceable manner, not with strong hand, nor with multitude of people. A person who makes a forcible entry forbidden by this section, or who, having peaceably entered upon real property, holds the possession thereof by force, and his assigns, undertenants, and legal representatives, may be removed therefrom, as prescribed in this title."

This statute the defendant threatened to violate, and to take the law into his own hands by forcibly seizing possession of the disputed strip.

If the plaintiff disputed the defendant's rights, and that she did, the defendant's remedy was to appeal to the courts by an action of ejectment where the legal rights of the parties may be determined by law. The plaintiff in such an action has the right to have

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the issues framed tried by a jury. Code Civ. Pro. § 968.

The defendant ought not to be permitted in advance to become judge, jury and sheriff in his own case. As was said by Mr. Justice Miller in the case of *Iron Mountain, etc., Rd.* v. *Johnson,* 119 U. S. 608, 611: "The general purpose of these statutes is, that, not regarding the actual condition of the title to the property, where any person is in the peaceable and quiet possession of it, he shall not be turned out by the strong hand, by force, by violence, or by terror. The party so using force and acquiring possession may have the superior title or may have the better right to the present possession, but the policy of the law in this class of cases is to prevent disturbances of the public peace, *to forbid any person righting himself in a case of that kind by his own hand and by violence,* and to require that the party who has in this manner obtained possession shall restore it to the party from whom it has been so obtained; and then, when the parties are in *statu quo,* or in the same position as they were before the use of the violence, the party out of possession must resort to legal means to obtain his possession, as he should have done in the first instance. This is the philosophy which lies at the foundation of all these actions of forcible entry and detainer, which are declared not to have relation to the condition of the title, or to the absolute right of possession, but to compelling the party out of possession, who desires to recover it of a person in the peaceable possession, to respect and resort to the law alone to obtain what he claims."

We do not in this case undertake to determine which of the parties to this action has the superior title to the disputed strip. That is not the question in proceedings for forcible entry and detainer. In such

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cases the plaintiff must succeed even though the defendant can show superior title or right of possession. *Kelly* v. *Sheehy*, 60 How. Pr. 439; *Town of Oyster Bay* v. *Jacob*, 109 App. Div. 615.

We simply decide that the defendant cannot without the judgment of the court in a proper action establishing his title take forcible possession of the disputed strip of land, and that the plaintiff is entitled to the judgment of this court restraining such acts on the defendant's part.

Judgment accordingly, with costs to plaintiff.

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THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* EDWIN E. ZITTEL, FRANK M. ZITTEL, ELSON FREEZE and PHILIP KATZ, Defendants.

(Court of General Sessions of the Peace, County of New York. December, 1920.)

**Indictments — when motion to dismiss granted — what constitutes a criminal conspiracy — landlord and tenant — evidence — criminal law — Penal Law, § 580(5).**

To constitute a criminal conspiracy it must appear either that the parties charged therewith agreed to commit a crime or that they agreed to employ criminal means to accomplish a lawful end. (P. 37.)

Section 580(5) of the Penal Law does not apply to real estate. (P. 38.)

A landlord who, before the expiration of the lease and in violation thereof, by means which violate no then existing statute, reenters the premises in the absence of the tenant, to make repairs, is a mere trespasser and commits no crime by such act. (P. 37.)

Where on motion to dismiss an indictment charging a landlord and the superintendent of an apartment house in the city of New York with conspiracy under section 580(5) of the Penal Law it appears that the defendants, in entering the



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apartment of one of the tenants in his absence for the purpose of making repairs, were not guilty of an unlawful or forcible entry, the motion will be granted on the ground that there was no legal evidence to sustain the indictment.

It is not every violation of a legal right that constitutes a crime, and if the tenant sustained damage by reason of the act of defendants, his remedy is by a civil action. (P. 38.)

MOTION to dismiss an indictment.

Edward Swann, District Attorney (Alfred J. Talley, Robert S. Johnstone, Ferdinand Q. Morton, Assistant District Attorneys, of counsel), for the People.

William H. Chorosh, for defendant Katz.

Frederick J. Groehl, for defendants Zittel and Freeze.

MULQUEEN, J. This is a motion to dismiss an indictment charging the defendants with conspiracy, in violation of subdivision 5, section 580 of the Penal Law. The defendants having been allowed to inspect the minutes of the grand jury, contend that there is no legal evidence to sustain the indictment.

It appears that for four years under lease granted by the defendants Zittel, the complainant had occupied an apartment of ten rooms on the fourth floor of the apartment house, No. 838 West End avenue, in the county of New York. His lease expired September 30, 1919. In May of that year he notified the defendants Zittel that he did not intend to renew the lease. The defendant Freeze is the superintendent of the said building. About June first defendant Katz leased the apartment for a term beginning October 1, 1919. On June fifth, the complainant closed his apartment and with his family consisting of his wife and five children went to the country. About the third of September he removed some of his belongings from

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838 West End avenue and on September tenth he removed most of his furniture to another apartment he had hired, leaving at the West End avenue rooms a parlor set of furniture in the parlor, some clothes in the closets, linen in the linen closet and a lot of children's toys and other things, in all about a van load. These articles were all removed by the complainant on September twenty-seventh to his new apartment. None of this property was lost or in any way damaged.

When defendant Katz leased the apartment on June first, the defendants Zittel agreed to make extensive repairs, the defendant Katz consenting to pay $500 as his share of the cost. In September the defendant Katz urged the Zittels to have this work done so that the apartment might be ready for occupancy as soon as possible; he urged that his wife was in a sanitarium, that her doctors had told him that her health would improve if she were taken home to live with her husband and her children; that he had offered the complainant six weeks' rent, if he would surrender possession on September fifteenth; that his offer had been refused; he also assured the defendants Zittel that he would pay any judgment that might be rendered against them, if they were mulcted in damages, for re-entering the apartment, without the consent of the complainant, prior to October first.

The Zittels yielded to his importunities, and directed the defendant Freeze to proceed with the repairs. Accordingly, Freeze gave the order and on September thirteenth the painters began their work. On the afternoon of the fifteenth, complainant's wife went to the apartment and found the painters at work; they did not leave when requested by her, and the defendant Freeze refused to remove them. She went to a police station, where the lieutenant in charge properly

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refused to send a policeman to the premises. She then went to the office of the Zittels and demanded that the workmen be removed, and be kept out of her apartment. She returned to the apartment on the morning of the sixteenth and found the workmen in the rooms. Freeze again refused to order them to leave. On the seventeenth, the complainant went to the house and requested the defendant Freeze to remove the paint pots and other things from the apartment and to keep the men out. Freeze promised to do so. On the eighteenth, complainant's wife again visited the apartment and found five or six workmen there. The parlor furniture had been removed to another room, and part of the flooring had been taken up. She called up her attorney and on his advice procured a summons for Freeze to appear before a magistrate. She returned with the summons, but Mr. Freeze and the men refused to leave. She then went to the police station; but the lieutenant again refused to send an officer to the apartment. She returned on the nineteenth, and found no workmen in the rooms, but on the twentieth and twenty-first the men were again at work. On the latter day, which was Sunday, the men left at her request, although Freeze directed them to remain. Meanwhile, the magistrate had dismissed the complaint of unlawful entry. Complainant's wife did not return to the apartment, but on the twenty-second the complainant went there with a friend. They went to the fourth floor, and found that the lock had been changed so that they could not enter the apartment. They went downstairs and waited for Mr. Freeze, who refused to let them use the elevator, and said he had orders from the Zittels not to allow complainant to go above the ground floor. On the twenty-third the complainant secured a summons in the Magistrate's Court, directing Mr. Freeze to answer a complaint of disor-

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derly conduct. On the twenty-fourth the magistrate ordered Mr. Freeze to give the new keys to the complainant. Freeze promised to comply, but failed to do so. The complaint was nevertheless dismissed by the magistrate. Complainant returned to the premises with his friend and a county detective and an official from the district attorney's office. Mr. Freeze refused to give them the keys or to allow them to use the elevator. They managed to gain access to the fourth floor, but found the doors locked, and they were unable to enter the apartment. After much discussion they left but complainant returned later in the evening and Mr. Freeze allowed him to enter the apartment to get some articles. Next day he went to the district attorney's office. Then the keys were given to him, and he removed the remainder of his property on September twenty-seventh to his new home.

I have stated the facts fully to clearly demonstrate that the learned magistrate committed no error in deciding that the defendants were not guilty of unlawful entry, and that there had been neither a forcible entry into the premises nor a forcible detainer thereof. The learned district attorney evidently is of the same opinion, as he has not charged the defendants with these crimes. He procured an indictment charging conspiracy. To constitute conspiracy it must appear either that the defendants agreed to commit a crime, or that they agreed to employ criminal means to accomplish a lawful end. In this case the end sought was the repair of the landlord's property, which is not a crime, and the means employed violated no statute in existence at that time. Assuming that the landlord violated the provisions of the lease, by re-entering in the absence of the tenant, to make repairs before the expiration of the term, that at most would make him a trespasser. But such a trespass was not a crime. Penal Law, §§ 1425, 2036.

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If the complainant sustained damage by reason of the defendants' acts, his remedy must be sought in the civil courts. Not every violation of legal right is a crime. Furthermore it has been held that subdivision 5 of section 580 of the Penal Law does not apply to real estate. *People* v. *New York & Manhattan Beach R. Co.*, 84 N. Y. 569. This case was cited by Mr. Justice Greenbaum on granting a certificate of reasonable doubt to defendants who had been convicted of conspiracy in the Court of Special Sessions on the charge that they had instigated a "rent-strike." *People* v. *Weser*, N. Y. L. J., December 3, 1919.

The learned district attorney maintains that the certificate of the learned justice was merely the expression of a doubt as to the legality of a conviction of persons who were in prison, and that it should not receive the weight of a well-considered opinion. On the contrary, I regard the ruling of the learned justice, who is now a member of the Appellate Division, as a correct statement of the law defined in the earlier case.

The learned district attorney vigorously opposes this motion, and as the issue was deemed of great importance to the community in view of the housing conditions at that time, and as the defendants were on bail, I deemed it advisable to await the decision of the Appellate Division. But that appeal has not been heard; new laws have been enacted, and this case has appeared several times on the daily calendar of this court for trial. The decision should not be delayed further. It is, perhaps, proper to add that the so-called rent laws have not been considered, as their enactment was subsequent to these occurrences.

Bail discharged and indictment dismissed as to all the defendants.

Indictment dismissed.

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## Matter of the Estate of NAT C. GOODWIN, Deceased.

(Surrogate's County, New York County, December, 1920.)

**Gifts — causa mortis — accounting — executors and administrators — jurisdiction — Surrogate's Court — evidence — Code Civ. Pro. § 2679.**

Objection having been made to the accounts of an administrator for failure to account for the proceeds of a judgment assigned by the decedent and satisfied of record, a motion to dismiss the objection, on the ground that the Surrogate's Court has no jurisdiction to determine the issues involved, will be denied under section 2679 of the Code of Civil Procedure.

Where, with the exception of delivery, all the other elements of a gift *causa mortis* of household furniture, of which decedent had no right of possession until the termination of the lease of an apartment which he had sublet, were amply proved and conceded, and it appears that he had given the donee the keys of the apartment before the gift was formally evidenced by a writing, it will be held that there was a valid gift *causa mortis*.

PROCEEDINGS upon the accounting of an administrator.

House, Grossman & Vorhaus, for administrator.

Rosenthal & Halperin (Max Halperin, of counsel), for Georgia Gardner.

Dittenhoefer & Fishel (I. M. Dittenhoefer, of counsel), for objectants Marc Klaw and Abraham L. Ehrlanger.

Hedges, Ely & Frankel, for creditor of decedent, John Wanamaker.

COHALAN, S. Jurisdictional question:

Objection is made to the account upon the ground that the administrator has failed to account for the

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proceeds of a judgment in the sum of $15,374.56, which was satisfied of record on August 5, 1919. Upon showing that the judgment was assigned by the decedent during his lifetime the administrator moves to dismiss this objection upon the ground that a determination of this issue involves the exercise of general equitable power which the surrogate does not possess. The administrator relies upon *Matter of Schnabel,* 202 N. Y. 134, and the objecting creditors upon *Matter of Watson,* 215 id. 209.

In *Matter of Schnabel, supra,* it appeared that the intestate had delivered to his wife, the administratrix, a bill of sale which transferred to her a saloon business. Upon her accounting objections were filed upon the ground that she had not accounted for the proceeds of the sale of the saloon business. The administratrix set up the bill of sale, which was found to be fraudulent and void. The Court of Appeals held that notwithstanding the provisions of section 2731 of the Code of Civil Procedure, the surrogate had no jurisdiction to set aside the bill of sale.

In *Matter of Watson, supra,* a similar situation arose. Objections were made to the executors' account upon the ground that they failed to account for a ruby ring and a pearl necklace which it was alleged belonged to the testatrix at the time of her death. One of the accountants claimed that the ring and necklace had been given to her by the decedent. Upon the authority of *Matter of Schnabel, supra,* the Appellate Division decided that the surrogate had no jurisdiction to determine the issue. The Court of Appeals, however, said (215 N. Y. 211):

"The appellant in this case merely invoked the jurisdiction of the surrogate to compel an executor to account for the property of the testator, and the exercise of that jurisdiction depended solely on the

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determination of the question of fact whether the property belonged to the testatrix at the time of her death. If the mere assertion of a claim of ownership by an executor ousts the surrogate of jurisdiction to compel an account of the property of the testator, it will be a simple matter to accomplish that result in every case in which an executor may prefer some other tribunal. Section 2731 of the Code of Civil Procedure, prior to the amendment of 1914, provided in part as follows: 'On the judicial settlement of the account of an executor or administrator, he may prove any debt owing to him by the decedent. Where a contest arises between the accounting party and any of the other parties respecting property alleged to belong to the estate, but to which the accounting party lays claim either individually or as the representative of the estate, or respecting a debt, alleged to be due by the accounting party to the decedent, or by the decedent to the accounting party, the contest must, except where the claim is made in a representative capacity, in which case it may, be tried and determined in the same manner as any other issue arising in the surrogate's court.' It would seem that the present case falls within both the letter and the spirit of the provision just quoted."

Section 2731 of the Code of Civil Procedure as above quoted (now 2679) is substantially the same as now, so far as this question is concerned. To show "That the Surrogate's Court has jurisdiction to try and determine the issues arising upon such a contest as was involved in this case" (p. 213), the Court of Appeals in the *Watson* case (p. 213) cited several Surrogate's Court cases, among which are *Matter of Ammarell,* 38 Misc. Rep. 399, which involved an assignment, and *Matter of Munson,* 70 id. 461, which involved the validity of a mortgage and other instruments, and

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*Matter of Archer,* 51 id. 260, which involved an assignment of savings bank accounts. In each of these cases the same question of jurisdiction was raised that is involved in this case. After citing these cases the Court of Appeals said (p. 213): "Plainly the Surrogate's Court has jurisdiction to try and determine issues arising upon any contest respecting a debt alleged to be due by the accounting party to the decedent or by the decedent to the accounting party. With equal reason it should have jurisdiction to determine conflicting claims of ownership to personal property between an accounting party and his estate. The trial and determination of such issues falls far short of the exercise of general equitable jurisdiction, and we think that the statute was intended to confer jurisdiction in both classes of cases." By the above language and by the citation of Surrogate's Court cases involving the validity of assignments and mortgages it appears that the *Watson* case practically overruled the earlier *Schnabel* case. Section 2731 of the Code of Civil Procedure (now 2679) is now held to mean just what it says.

If the question of jurisdiction were in any doubt after the Watson decision the subsequent revision of chapter 18 of the Code of Civil Procedure, in 1914, including the enactment of section 2510 of the Code of Civil Procedure, as it now reads, seems to give to the Surrogate's Court an ample grant of jurisdiction. Even under the narrowing constructions of section 2510 of the Code of Civil Procedure, that have been adopted by the Appellate Division beginning with the *Holdworth* case (166 App. Div. 150), subdivisions 3 and 4 of section 2510 of the Code of Civil Procedure, read in connection with the general grant of jurisdiction contained in the first paragraph of the section, are certainly sufficient. *Matter of*

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*Brady,* 111 Misc. Rep. 492. The motion to dismiss this objection is denied.

Question of gift:

Miss Georgia L. Gardner claims title to the furniture referred to in Schedule G of the account through a gift *causa mortis.* It appears to be practically conceded that Mr. Goodwin died of the ailment from which he was suffering when he made the gift. All of the other elements of a gift *causa mortis,* except delivery, were amply proved and in effect conceded at the hearing. This is the only question discussed in the briefs submitted. The gift is alleged to have been made December 26, 1918. It was evidenced by a writing which among other things stated, " To you Georgia L. Gardner, in the event of my death, I give you the entire contents of my apartment at No. 601 West One Hundred and Fifteenth street to do with as you see fit." It appears that when the alleged gift was made the apartment was sublet and Mr. Goodwin was receiving the rent. One of the witnesses testified that the intestate asked Miss Gardner " if she had a list of the inventory of the apartment which he had sent her to get on the sublet and asked her if she had the keys to the apartment, with the list, and she answered, 'Yes,' and from that the conversation led into the drawing of this paper at his dictation." Mr. Goodwin spoke of how much Miss Gardner had done for him and stated that the furniture was all he had; that he did not expect to live very long, and expressed anxiety to do as much as he could for her; that he wanted her to have the apartment and that she should have it in writing. Later, on December 31, 1918, in the presence of another witness, the intestate again stated that he wanted Miss Gardner to have the title to the apartment. Miss Gardner was present and the paper was produced and Mr. Goodwin read it aloud. Miss Gardner produced a copy

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of this paper at the hearing and it was stipulated that it be used in place of the original, which had been submitted to this court upon a prior application and has not yet been found.

It thus appears that the donor had already given the keys of the apartment to Miss Gardner before the gift was formally made. It was not necessary for him to ask her for the keys and again formally present them with the paper that he executed. It seems to be sufficient if he referred to the fact that she had the keys and therefore possessed the means to reduce the furniture to possession. She was not bound to do so at once. In fact, Goodwin's gift was subject to the lease of the apartment with the furniture included. He had no right to the possession of the furniture until the termination of the lease. The fact of the existing lease and the collection of rent by him does not prove there was no delivery. It may also be pointed out that the testimony of the maid as to the keys is merely negative. She knew of two sets of keys only and said that her employer, Mr. Goodwin, did not have possession of either of them during the period when the gift was made. Unknown to her, however, he doubtless had a set of keys, which must have been the ones referred to by the witness, who testified to his statement that Miss Gardner already had the keys.

A symbolical delivery is sufficient. But even in gifts *inter vivos,* where the rule as to delivery is more strict, there is authority for the proposition that where the gift is evidenced by a writing, as in this case, the ordinary rules as to delivery are somewhat relaxed. See *Matter of Cohn,* 187 App. Div. 392; *Hawkins* v. *Union Trust Co.,* Id. 472.

I will hold that the intestate made a valid gift *causa mortis* to Miss Gardner.

Decreed accordingly.

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Misc.] Surrogate's Court, New York County, December, 1920.

## Matter of the Estate of LOWELL LINCOLN, Deceased.

(Surrogate's Court, New York County, December, 1920.)

**Transfer tax — what not subject to — partnership agreement — good will — evidence — services — when deduction from net profits for salaries unauthorized.**

Where by a partnership agreement the money standing in the name of a partner is to be credited on the first days of January and July in each year, the share of a partner in the capital with interest to the date of his death, September 2, 1917, represents the value of the transfer at his death, and a claim of the executors in a transfer tax proceeding that the interest be discounted to January 1, 1918, is properly disallowed.

The partnership agreement provided that the capital of the member of the firm who died during the continuance of the copartnership should remain in the business for a period of not exceeding nine months subsequent to his death and that his personal representatives should receive the same interest on capital and the same share of the profits for that period as was provided by the copartnership agreement. *Held*, that as the profits for the nine months succeeding decedent's death were not due and payable under the partnership agreement until the expiration of the period therein fixed, and carried no interest, the amount of said profits should be discounted so as to ascertain its value as of the date of decedent's death.

The business of the firm was that of selling goods on commission and the unusual earnings for the years 1916 and 1917, which the transfer tax appraiser in estimating the value of the good will included in his average of profits, were due solely to the extraordinary increase in the inventory value of the merchandise, on the sale of which commissions were received. *Held*, that in the circumstances the profits for those years should have been excluded.

The profits of the year 1914 should have been eliminated because of the conditions which resulted in profits far below normal earnings, and the average for 1912, 1913 and 1915 should have been taken as the basis for estimating the value of the good will.

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The five per cent of profits which, under the partnership agreement decedent was entitled to receive, should have been applied to the good will value of the business in ascertaining his interest therein.

No proof having been offered of the nature, extent or value of the services, if any, rendered by decedent and his copartners to the firm, a deduction from the net profits, for salaries to the copartners, was unauthorized and properly disallowed by the transfer tax appraiser.

APPEAL from an order fixing the transfer tax.

Nicoll, Anable, Fuller & Sullivan (Outerbridge Horsey, of counsel), for executor.

Lafayette B. Gleason (Schuyler C. Carlton, of counsel), for State Comptroller.

COHALAN, S. This appeal is taken by the executors of decedent's estate from the order fixing the transfer tax on the ground that his interest in the copartnership of Catlin & Co. has been appraised in the report in excess of its true value.

The sum found by the appraiser as the amount due decedent from the firm was $841,844.96, to which has been added interest from July 1, 1917, to September 2, 1917, the date of decedent's death.

The copartnership agreement provided that the money standing in the name of a copartner would be credited on the first days of January and July in each year. The appraiser properly disallowed the claim of the executors that the item of interest be discounted to January 1, 1918. The share of the decedent in the capital, with interest to the date of his death, represents the value of the transfer as of that date.

The copartnership agreement contained a provision that the capital of the member of the firm who died during the continuance of the copartnership should

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remain in the business for a period of not exceeding nine months subsequent to his death and that his personal representatives should receive the same interest on capital and the same share of the profits for that period as was provided by the copartnership agreement. The profits for the nine months succeeding decedent's death were shown to be the sum of $36,462.84. As these were not due and payable under the agreement until the expiration of the period therein fixed, and carried no interest, I think that this sum should be discounted so as to ascertain its value as of the date of decedent's death.

In estimating the value of the good will the appraiser has included in his average the profits for the years 1916 and 1917. The firm was in the business of selling goods on commission. The unusual earnings for the two years mentioned were due solely to the extraordinary increase in the inventory value of the merchandise on the sale of which the commissions were received. Under the peculiar circumstances of this case as disclosed by the record I am of the opinion that the profits for these two years should be excluded in the calculation of the good will value. The year 1914, which was also considered by the appraiser, should be eliminated because of the conditions which resulted in profits far below the normal earnings of the copartnership. The average for the years 1912, 1913 and 1915 should be taken as the basis for the calculation of the good will.

Pursuant to the articles of copartnership the decedent was to receive five per cent of the profits. The appraiser should have applied this percentage to the good will value of the business in ascertaining decedent's interest therein. *Matter of Hellman,* 172 N. Y. Supp. 671; affd., 187 App. Div. 934; affd., 226 N. Y. 702.

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No proof was offered of the nature, extent or value of the services, if any, rendered by decedent and his copartners to the firm. Under these circumstances a deduction from the net profits for salaries to the copartners would be unauthorized, and the appraiser properly disallowed the claim.

The report will be returned to the appraiser for correction as indicated in this decision.

Report returned to appraiser for correction.

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SLATTERY & COMPANY, Plaintiff, *v.* THE NATIONAL CITY BANK OF NEW YORK, Defendant.

(Municipal Court of the City of New York, Borough of Manhattan, Ninth District, December, 1920.)

**Conversion — check — delivery to wrong person by mistake — bona fide purchaser — when drawer of check as assignee of proper payee acquires no title — negligence of drawer proximate cause of loss.**

To maintain an action for conversion the plaintiff must have some title to or interest in the property alleged to have been converted. (P. 51.)

In an action for the alleged conversion of a check and the proceeds thereof drawn by plaintiff it appeared by the agreed statement of facts that by mistake the check was forwarded, not to the payee, but to another customer of plaintiff having the same name, upon whose indorsement of the check the amount thereof was paid to him by a bank in the belief that he was the proper payee. *Held,* that the alleged proper payee of the check, who received nothing, acquired no title to or interest therein, and that plaintiff as his assignee had no right of action for the conversion of the check against the defendant bank, which after collecting the check from the bank on which it was drawn transmitted the proceeds to the bank which had cashed the check. (Pp. 51, 52.)

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The negligence of the plaintiff or its agent delivering the check to the wrong person, thus enabling him to pass an indefeasible title to a *bona fide* purchaser, was the proximate cause of the loss which plaintiff must bear rather than defendant which parted with its money in absolute good faith. (Pp. 53, 54.)

SUBMISSION of controversy on agreed statement of facts.

Hardin & Hess (Harold B. Elgar and Ernest Angel, of counsel), for plaintiff.

Shearman & Sterling (Chauncey B. Garver and Chester B. McLaughlin, Jr., of counsel), for defendant.

GENUNG, J. This is an action for the sum of $167.46, with interest from October 27, 1919, brought by the plaintiff for the alleged conversion by defendant of a check and the proceeds thereof, drawn by the plaintiff on the Seaboard National Bank of New York, numbered 8862, dated October 26, 1919, and payable to the order of Harold E. Richards. Plaintiff is a brokerage firm and dealer in investment securities. Some months prior to the issuance of the check, the plaintiff had on its books two accounts, one in the name of H. E. Richards, Rockdale, Tex., and the other in the name of Harold E. Richards, Bartlesville, Okla. In April, 1919, the plaintiff closed its account with the said H. E. Richards, Rockdale, Tex., and sent him a fifty dollar liberty bond and a check for the sum of fifty-four dollars and seventy-four cents, together with a statement showing that his account was closed. In October, 1919, the account with the said Harold E. Richards, Bartlesville, Okla., was open, and at that time there was sold for the account of the said Harold E. Richards, Bartlesville, Okla., a certain quantity of securities, and a check for $167.64, dated



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October 26, 1919, numbered 8862, payable to Harold E. Richards, was drawn on the Seaboard National Bank of New York. By mistake the check was forwarded to H. E. Richards, Rockdale, Tex., instead of being forwarded to Harold E. Richards, Bartlesville, Okla. Inclosed with the check was a statement showing the transaction out of which the account arose. Upon receipt of the check, Harold E. Richards, Rockdale, Tex., indorsed the check, and secured the endorsement of J. R. Breen, who was known to the officers of the Taylor National Bank, Taylor, Tex., and had the check cashed by the Taylor National Bank, who delivered the proceeds thereof to Harold E. Richards, believing him to be the proper payee of the check. The check then was sent to the National City Bank, the defendant herein, by its correspondent, the Taylor National Bank, and the National City Bank collected the proceeds thereof from the Seaboard National Bank and transmitted the same to the Taylor National Bank. The National City Bank undoubtedly believed, as did the Taylor National Bank, that the indorsement of Harold E. Richards was the indorsement of the proper payee of the check. Harold E. Richards, Bartlesville, Okla., never received the proceeds of the check, and prior to the commencement of the action, assigned to the plaintiff herein any claim which he might have by reason of the issuance of the check or of any of the facts above stated.

The plaintiff claims that the indorsement, made by Harold E. Richards, Rockdale, Tex., with the knowledge that he had no right to the check or the proceeds thereof, was a forged indorsement, although this knowledge was not communicated to the Taylor National Bank, and claims the forged indorsement gave to the defendant no right to present this check to the Seaboard National Bank or to retain or dispose of the proceeds.

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If this indorsement was a forged indorsement, it is well settled that no title passed by the forged indorsement (Neg. Inst. Law, § 42), and, further, the bank or person making the payment on the forged instrument did so at its peril (*Seaboard National Bank* v. *Bank of America,* 193 N. Y. 26), and the defendant obtained no title to the check and the proceeds thereof belonged to the payee whose indorsement had been forged (*Stein* v. *Empire Trust Co.,* 148 App. Div. 850), and the defendant, having collected the amount of the check with the forged indorsement of the payee thereon, is not entitled to retain the proceeds as against the payee. *Standard Steam Specialty Co.* v. *Corn Exchange Bank,* 84 Misc. Rep. 445. The plaintiff claims the diversion by the defendant, under these circumstances, of the proceeds of the check from the proper payee and payment thereof to the Taylor National Bank, constituted a conversion and gave the plaintiff a right of action for damages to the face amount of the check. *Graves* v. *American Exchange Bank,* 17 N. Y. 205; *Mead* v. *Young,* 4 T. R. 28; *Seaboard National Bank* v. *Bank of America,* 193 N. Y. 26.

The defendant claims that the plaintiff, as the assignee of Harold E. Richards, Bartlesville, Okla., has no interest in the check. It is well settled that, to support an action for conversion, the plaintiff must have some title or interest in the property alleged to have been converted. Title to a check passes by indorsement and delivery, or, if the check is payable to bearer, by delivery alone. It appears that the plaintiff's assignor, the alleged proper payee, received nothing, since instead of being delivered to him, the check was delivered to a third person, and consequently Harold E. Richards, Bartlesville, Okla., acquired no title or interest in the check. If this be

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so, the plaintiff's assignor had no right of action against the defendant for conversion.

The defendant further claims there was no forgery in the indorsement of the check by Harold E. Richards, Rockdale, Tex., to whom the check was sent by the plaintiff. Undoubtedly he knew, when he received the check, that a mistake had been made and that the plaintiff might make claim thereafter for the proceeds thereof, but that does not alter the fact that the plaintiff actually made and delivered the check to him as payee and that he could give a good title to it by indorsement to a *bona fide* purchaser for value and without notice. The only ground for claiming that the plaintiff's assignor was the payee of the check was that it was drawn by the plaintiff to be forwarded to him in payment of certain securities which had been sold for his account by the plaintiff. The plaintiff's original purpose in drawing the check, however, is of no importance when it actually delivered the check to a third person, who was also named in the check as payee. The intent to make the check payable to Harold E. Richards, Bartlesville, Okla., was superseded and blotted out by the actual delivery of the check to Harold E. Richards, Rockdale, Tex. *Weisberger Co.* v. *Barberton Savings Bank,* 84 Ohio St. 21; 34 L. R. A. (N. S.) 1101; *Heavey* v. *Commercial National Bank,* 27 Utah, 222. In *Weisberger Co.* v. *Barberton Savings Bank,* the plaintiff drew a check to the order of Max Roth, who did business as the plaintiff knew at 48 Walker street, New York, but by mistake mailed the check to Max Roth, 48 Walker street, Cleveland, O. When the letter carrier found no one by that name on Walker street, he found one Max Roth on Henry street, and gave him the letter. He indorsed the check, transferred it for cash to another, who collected from the drawee bank. In an action by the plaintiff against the drawee bank,

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the court held the plaintiff could not recover. In *Heavey* v. *Commercial National Bank,* a bank by postal card, mistakenly, informed the wrong person, but of the same name, that money had been deposited to his credit in the bank. This person wrote to the bank for a draft which the bank sent to him and which he indorsed to a holder in due course, and the court held that he had a good title.

It is well settled in this state that, when a check is delivered to one person, even though the person delivering it believes him to be some one entirely different, the delivery is sufficient to enable the person receiving it to pass an indefeasible title to a *bona fide* purchaser. *First National Bank* v. *American Exch. Nat. Bank,* 49 App. Div. 349; affd., 170 N. Y. 88; *Sherman* v. *Corn Exchange Bank,* 91 App. Div. 84; *Hartford* v. *Greenwich Bank,* 157 id. 448. Under these decisions, when the plaintiff delivered the check to Harold E. Richards, Rockdale, Tex., the fact that it believed that he was the person to whom it was indebted was immaterial. Since there was a delivery to Harold E. Richards, Rockdale, Tex., even though the plaintiff in making the delivery labored under a misapprehension, it is clear that the said Richards could pass a good title to a *bona fide* purchaser. *Salen* v. *Bank of the State of New York,* 110 App. Div. 636; *Cluett* v. *Couture,* 140 id. 830.

In addition to the foregoing, the defendant claims that the plaintiff is estopped, even if it were held that the indorsement in question was a forged indorsement, from asserting that fact. The plaintiff actually delivered the check to a man having the same name as the plaintiff's assignor, the alleged proper payee. The result was clearly to be foreseen and the negligence of the plaintiff, or its agent, is a proximate cause of the loss. It is well settled that estoppel is a valid defense

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to an action resting on a forgery. *Heffner* v. *Dawson*, 63 Ill. 403; *Kuriger* v. *Joest*, 22 Ind. App. 633; *Corwith First State Bank* v. *Williams*, 143 Iowa, 177; *Casco Bank* v. *Keene*, 53 Maine, 103; *Gluckman* v. *Darling*, 85 N. J. L. 457; *Blodgett* v. *Webster*, 24 N. H. 91; *Cohen* v. *Teller*, 93 Penn. St. 123; *Murphy* v. *Estate of Skinner*, 160 Wis. 554; *National Bank of Commerce* v. *First National Bank*, 152 Pac. Repr. 596. As between the plaintiff and the defendant herein, it is clear that the plaintiff, through whose fault the loss occurred, rather than the defendant, who parted with money in absolute good faith, should bear the loss.

The defendant is entitled to judgment.

Judgment for defendant.

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ABRAHAM BLOCK, Plaintiff, *v.* BACON COAL COMPANY, Respondent.

(Supreme Court, New York Trial Term, December, 1920.)

**Venue — changed to proper county — Code Civ. Pro. § 984.**

Where after a jury had been impaneled for the trial of an action brought in the county of New York the court, upon learning that the cause of action arose and both parties resided in the county of Kings, refuses to try the case in view of section 984 of the Code of Civil Procedure, defendant's motion to transfer the cause to Kings county will be granted.

*It seems* that the court had power of its own motion to summarily order the trial of the case in the county of Kings.

MOTION to change place of trial.

David M. Finck (Jacquin Frank, of counsel), for plaintiff.

William Dike Reed, for defendant.

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FORD, J. This is one of that class of cases which by section 984 of the Code "must be tried in the county, in which one of the parties resided, at the commencement thereof."

A jury had already been impaneled before the court learned that the cause of action arose and both parties resided in the county of Kings. Thereupon the trial justice declared that he would not try the case.

Up to this point both counsel had proceeded in evident willingness to have the trial in New York county and it was only after the court's express refusal to try the case that defendant's counsel moved that it be sent to Kings, the proper county, for trial.

This exact narrative is given because I desire that there be no misapprehension as to the precise grounds upon which the order transferring the case is based. It was essentially upon the motion of the court itself that the order was made although in form upon the motion of defendant's counsel.

This puts the case on all fours with *Phillips* v. *Tietjen,* 108 App. Div. 9, which was decided by the Appellate Division of the second department in 1905. That case held squarely that the trial court might not of its own motion send the case to the proper county.

That rule has never been expressly adopted in this department so far as I can discover, although the *Phillips Case, supra,* was mentioned in *Cronin* v. *Manhattan Transit Co.,* 124 App. Div. 543, a first department decision, wherein the court pointed out that the rule laid down by the second department did not apply to the case then under consideration.

In *Goldfelder* v. *Greenberg,* 189 App. Div. 184, the second department so far as can be gathered from the brief opinion seems to have departed from the rule laid down in the *Phillips Case, supra.*

The *Goldfelder Case, supra,* was brought in West-

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chester county in which neither party resided. Defendant served the demand required by section 986 of the Code but failed to comply with the further provision that a notice of motion be served within the time specified for a change of the place of trial to the proper county. Such a motion was made afterwards and was opposed upon the sole ground that it had not been made within the statutory time. The motion was denied and the Appellate Division in reversing held: "Section 986 of the Code is directory merely, and the court had power under section 987 to change the place of trial although no demand had been made. (*Cronin* v. *Manhattan Transit Co.*, 124 App. Div. 543, 544.) Westchester county is not the proper county for the trial of this action. (Code Civ. Proc. § 984.) It was a mistake to bring it there, and the court is not without power to correct it. The motion ought to have been granted, and it follows that the order must be reversed."

An examination of the cases which discuss the question of a change in the place of trial reveals that they almost uniformly consider it from the point of view of the statutory right of the litigant to have the place changed.

The rights of the public and of the taxpayer have not received due consideration as it seems to me.

There has grown up among lawyers the practice of bringing actions for trial in New York county although the cause of action arose and both parties resided in an adjacent county or counties.

The instant case grew out of an accident which occurred in Kings county. Both parties and all the witnesses resided there. Merely because his office is in New York county or for some other trivial reason, the lawyer brings the case for trial to our crowded courts.

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Usually the opposing lawyer is quite content because his office is also here. Practically the interests of the litigants and the convenience of witnesses are not considered. As a matter of fact it is of small moment to the parties where the case is tried for the same brand of justice is handed down in either case.

But why should either lawyer or litigant be permitted to lift the burden of the trial from one county and impose it upon another?

The statute says the case *must be tried* in the county where the litigants or one of them resided. I believe the court has the power of its own motion to summarily order such a case to the county where it properly belongs and to impose upon that county the burden of disposing of its own lawsuits. The order transferring the case to Kings county has been signed.

Motion granted.

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NORTHWAY HOLDING COMPANY, INC., Plaintiff, *v.* ALICE A. PARKER, Defendant.

(Supreme Court, Tioga Special Term, December, 1920.)

**Landlord and tenant — action by corporation landlord for rent of an apartment in the city of New York — motion to change place of trial from county of plaintiff's residence to New York county granted as matter of right — motion to change venue for convenience of witnesses not waived by former motion.**

Justice is not promoted by permitting a landlord, incorporated to own and rent a building in the city of New York, to bring an action for a small amount of rent in a county wherein it claims a residence remote from the county where the leasing was made, and in which all persons interested and their necessary witnesses have their actual residence and may easily resort to the courts.

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Where in an action brought by such a landlord to recover rent for an apartment in the city of New York for the months of October and November, 1920, under a written lease entered into on September 20, 1920, the answer pleads the defenses permitted by chapter 944 of the Laws of 1920 which went into effect September 27, 1920, and it is plainly apparent that the venue, as laid, was to vex the defendant and make difficult her opportunity for defense, her motion to change the place of trial to the county of New York will be granted as a matter of right.

The defendant in demanding that the venue be changed as a matter of right did not thereby waive her right to make a motion to change the place of trial on the ground that the conveniences of witnesses and the ends of justice would be promoted.

MOTION by defendant to change place of trial.

Thomas P. McCormick, for motion.

Bond & Babson, opposed.

DAVIS, J. The defendant is moving to change the place of trial from Tioga county to New York county.

The plaintiff has brought this action to recover rent for the months of October and November, 1920, due, as it claims, under a written lease entered into between the parties September twentieth preceding, for the rent of an apartment. The defendant, availing herself of the defenses permitted by chapter 944 of the Laws of 1920, which became a law September twenty-seventh, alleges that the rent has been increased from $166.67 per month the preceding year, to $250 per month, and that the rent accruing under the agreement is unjust and unreasonable, and that the agreement is oppressive.

The plaintiff, a corporation, has stated in its certificate of incorporation that its principal office and place of business is in the village of Owego, Tioga county,

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and claims its residence there. The apartment in question is situated in the city of New York; the defendant resides in the city of New York, and the main office from which the officers of the plaintiff transact all their business is in that city. The plaintiff has a nominal office in the village of Owego in an office occupied by a firm of attorneys, one of whom has been formally appointed agent in charge of the office of defendant, upon whom process may be served. It does not appear that this agent has any particular duties to perform. No officer, director or stockholder resides in the village of Owego or county of Tioga, nor does it own any property or transact any business there. It says that it pays taxes in Tioga county. It would be interesting to know how much tax it pays, in the absence of any property interest in that county, and by whom it is expected to be sued, so process could there be served on its agent in its office, but the plaintiff's affidavits are discreetly silent on these subjects.

This residence is, of course, merely nominal and fictitious. The plaintiff, in designating the location of its principal office in its certificate of incorporation, evidently relied on decisions of the courts to the effect that the residence of corporations, for the purpose of taxation and in the bringing of actions by or against a corporation in good faith, is deemed to be in the county named in the certificate of incorporation as containing its principal office. See *Oswego Starch Factory Co.* v. *Dolloway,* 21 N. Y. 449; *People ex rel. Knick. Press* v. *Barker,* 87 Hun, 341; *Rossie Iron Works* v. *Westbrook,* 59 id. 345; *General Baking Co.* v. *Daniell,* 181 App. Div. 501.

The purpose of the plaintiff, in view of the facts stated, is obvious, to wit: it has established a nominal residence in a county far distant from New York city

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where it owns its property and transacts its business of renting apartments to tenants, so that in bringing actions for small amounts due for rent, it may compel tenants to be at great inconvenience and expense in making their defenses to any claim, however exorbitant, made by the landlord.

In the decisions to which I have referred, the courts were not dealing with a situation such as is presented here. They were dealing with corporations which had, in apparent good faith and for some legitimate purpose, established their office and principal place of business in one locality and had thereafter engaged in some line of manufacturing or mercantile business having large executive offices elsewhere. There is a vast difference between a *bona fide* residence and one established solely for bringing suits in the county of such residence on causes of action which arose, where the defendants reside, in a distant county. I should not, therefore, feel bound by such decisions which may readily be distinguished in principle from the case under consideration, if it were thereby necessary to defeat the plain and apparent purpose of the plaintiff to harass and annoy its tenants and to prevent the defendant and others similarly situated from having a fair day in court; or if this was the only legal question involved in this controversy and its determination was necessary for the maintenance of the rights of the defendant. Such practices of using apparently legal means for an illegitimate and unworthy purpose are not to be encouraged, but rather to be discouraged by the courts.

But there is also presented another question on the motion and that is whether the place of trial should be changed for the convenience of witnesses and to promote the ends of justice.

The defendant by statute is given the benefit of

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certain defenses. She says she has necessary and material witnesses residing in the city of New York to maintain them. I can neither on this practice motion anticipate the result of a motion for judgment on the pleadings, which plaintiff's attorney says he has made, nor declare unconstitutional the statute on which defendant relies for her defense.

The ends of justice are not promoted by permitting the plaintiff, incorporated to own and rent a building in New York city, to bring an action for a small amount of rent, in a county wherein it claims residence remote from the county where the contract was made and in which all persons interested and their necessary witnesses have their actual residence, and may easily resort to the courts. That the reason for laying the venue in Tioga county was to vex the defendant and make difficult her opportunity for defense is plain and apparent, and the court cannot give to the scheme any countenance or approval. The action should be tried where the cause of action arose. *Spanedda* v. *Murphy,* 144 App. Div. 58; *Navratil* v. *Bohm,* 26 id. 460; *O'Beirne* v. *Miller,* 35 Misc. Rep. 337; General Rules of Practice, 48.

The defendant in demanding that the venue be changed as a matter of right, did not thereby waive any right to apply on other grounds. No demand was necessary preliminary to a motion to change the place of trial on the ground that the convenience of witnesses and the ends of justice will be promoted. *Larkin* v. *Watson Wagon Co.,* 68 App. Div. 86; 2 Rumsey Pr. (2d ed.) 143. For the reasons stated the motion will be granted, with ten dollars costs.

Motion granted, with ten dollars costs.

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PEOPLE OF THE STATE OF NEW YORK, Plaintiff, v. ANGELO GIORDANO, Defendant.

(Court of General Sessions of the Peace, in and for the County of New York, December, 1920.)

**Code Crim. Pro. §§ 285, 684 — motion after judgment of conviction for inspection of grand jury minutes denied — waiver of rights.**

Sections 285 and 684 of the Code of Criminal Procedure refer only to imperfections of form and departures from the form or mode of procedure prescribed by said Code, or to errors or mistakes in form or in mode of procedure, and are not broad enough to warrant disregarding the violation of a constitutional right.

After his conviction for murder in the first degree, the defendant's motion for an inspection of the minutes of the grand jury for the sole purpose of making a motion to dismiss the indictment, on the ground that there was no evidence before the grand jury to connect him with the crime charged, except that of accomplices, will be denied on the ground that not having been made prior to the judgment of conviction the defendant had waived his right to make the motion.

MOTION by the defendant, after conviction of murder in the first degree and appeal therefrom to the Court of Appeals, to inspect the minutes of the grand jury for the purpose of moving to dismiss the indictment.

Martin W. Littleton (Owen N. Brown, of counsel), for motion.

Edward Swann, district attorney (Robert C. Taylor, of counsel; George N. Brothers, with him on the brief), in opposition.

NOTT, J. On October 5, 1916, one Verrazano was murdered in the county of New York. On

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May 1, 1918, the defendant was convicted of murder in the first degree, in that he procured others to murder Verrazano. On May 16, 1918, he appealed to the Court of Appeals, and pending that appeal has made several motions for a new trial on the ground of newly discovered evidence, which motions have been denied. 106 Misc. Rep. 235. He now for the first time moves to inspect the minutes of the grand jury which indicted him, for the purpose, should such inspection be granted, of subsequently moving to dismiss the indictment on the ground that there was no evidence before the grand jury, except that of accomplices, to connect him with the crime and that, therefore, he was improperly indicted and his constitutional rights invaded. *People* v. *Glen*, 173 N. Y. 395.

Upon the trial testimony was given by witnesses, other than those called before the grand jury, which the jury found corroborated the accomplices, and unless and until the judgment of conviction is reversed upon the ground that there was no sufficient corroboration, it must be assumed, for the purposes of this motion, that the defendant was properly convicted and that the corroboration was sufficient. The question, therefore, arises whether an indictment should be dismissed because founded upon insufficient evidence in a case where the defendant has been subsequently tried and convicted upon sufficient evidence and has not attacked the sufficiency of the indictment until after final judgment. Had such motion been made prior to trial the granting thereof would have been no bar to the finding of a new indictment upon sufficient evidence. But should the motion be granted after the trial and conviction of the defendant, the defendant might well claim a former jeopardy and that he could not be subsequently prosecuted for the

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same offense and if that claim were well founded it would follow that he, although convicted upon sufficient evidence, would go free because he had delayed his attack upon the indictment until it was too late to remedy its weakness. In my opinion this result is contrary to the ends of justice and places a premium upon delay and laches and should not receive the sanction of the courts unless required by other well-settled principles of law.

The district attorney contends that under sections 285 and 684 of the Code of Criminal Procedure this motion must be denied for the reason that the defendant has not been prejudiced because he was ultimately convicted on proper evidence. I am of the opinion, however, that those sections refer only to imperfections of form and departures from the form or mode of procedure prescribed by the Code, or to errors or mistakes in form or in mode of procedure, and are not broad enough to warrant the disregarding of the violation of a constitutional right.

I am, however, of the opinion that the defendant has waived his right to make this motion by not doing so prior to the imposition of final judgment. If it be true that there was no testimony before the grand jury, other than that of accomplices, connecting defendant with the crime, that fact was as much within the defendant's knowledge or his means of knowledge at the time of the imposition of final judgment as it is today and there is no reason shown why the motion was not made before judgment or the indictment attacked at or before the time when the defendant was called upon after his conviction to state why judgment should not be imposed upon him. The general rule is stated as follows, by the Court of Appeals, in *People* v. *Willett,* 213 N. Y. 368, 375: "Unless a motion founded upon the indictment and

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the insufficiency thereof is made before or at the time when the defendant is called for judgment, the objections thereto are waived." Citing *People* v. *D'Argencour,* 95 N. Y. 624; *People* v. *Wiechers,* 179 id. 459.

The defendant, however, claims that his constitutional right has been invaded and that the doctrine of waiver does not apply in such case. While it has been held that a defendant can not waive a constitutional objection to the power or jurisdiction of the court to try him (See *People* v. *Cancemi,* 18 N. Y. 128), other constitutional rights of the defendant may be waived as well as statutory rights. See *Dodge* v. *Cornelius,* 168 N. Y. 242, and cases cited therein. See, also, *People* v. *Rathbun,* 21 Wend. 509; *Pierson* v. *People,* 79 N. Y. 424; *People* v. *Cosmo,* 205 id. 91; *People* v. *Toledo,* 150 App. Div. 403.

While this motion is not for the dismissal of the indictment but for the inspection of the minutes of the grand jury, yet, as it is made upon the sole ground that it is for the purpose of subsequently moving to dismiss, it would be futile to grant the motion if the subsequent motion to dismiss must inevitably be denied.

For these reasons this motion is denied.

Motion denied.

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HILDA J. WATERS, Plaintiff, *v.* BEAU SITE COMPANY, Defendant.

(City Court of the City of New York, Trial Term, December, 1920.)

**Bailments — action to recover value of contents of a trunk — evidence — when complaint dismissed.**

Plaintiff who, with her husband, was about to leave defendant's hotel where they were guests, with the intention of returning in a few days, upon being informed by defendant's man-



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ager that their trunks would be taken care of during her absence, a trunk in which among other articles was placed a diamond pendant valued at more than $1,000 was delivered to defendant for storage. When on plaintiff's return the trunk was sent to her room and opened the pendant was missing. In an action to recover its value it was conceded that the relation between the parties was that of bailor and bailee, but there was no evidence that defendant had actual notice that the pendant was in the trunk. *Held*, that the dismissal of the complaint upon the ground that defendant, by becoming the bailee of the trunk and its contents, was not required to and did not assume that the trunk contained articles other than those ordinarily contained in trunks, and that in consequence there was no bailment as to the pendant, was proper.

ACTION to recover the value of the contents of a trunk.

Everett, Clarke & Benedict, for plaintiff.

Nadal, Jones & Mowton, for defendant.

CALLAHAN, J. Plaintiff and her husband had been guests at the Hotel Biltmore, New York city, conducted by defendant. They were about to leave the hotel with the intention of returning in a few days. Upon inquiry she was informed by the assistant manager of defendant that her trunks would be taken care of during her absence. Her testimony is that he stated that the hotel maintained a safe place for trunks, describing a certain storage room with iron doors which were always kept locked, and that many wealthy guests of the hotel left their trunks with valuable contents in the care and custody of the hotel while they were away. Plaintiff and her husband further testified that they thereupon packed two trunks, in one of which was placed a diamond pendant valued at over $1,000. This trunk was thereafter delivered to defendant for storage during plaintiff's absence. Upon her

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return the trunks were sent to her room and upon opening them she discovered that the contents had been tampered with and that the pendant was missing. This action is brought to recover its value. It was conceded upon the trial that the relation between the parties as to the stored property was that of bailor and bailee and not that of innkeeper and guest. Upon the foregoing facts the court dismissed the complaint upon the ground that the defendant, by becoming a bailee of plaintiff's trunks and their contents, was not required to and did not assume that the same contained articles other than those ordinarily contained in trunks and that, consequently, there was no bailment as to the pendant. There was no testimony in the case to show that defendant had actual notice of the fact that this valuable piece of jewelry was in plaintiff's trunk. Nor is it so usual or customary to place articles of this character in trunks as to warrant or require any assumption on defendant's part that the trunk contained the jewel in question. In such case there is no contract of bailment, for the bailee cannot by artifice be compelled to assume a liability greater than he intended. Edwards Bailm. (3d ed.) § 49. It does not follow that there must be an intention to impose upon the bailee. It is sufficient if such is the practical effect of the bailor's conduct. By the use of the word artifice it is not intended to convey that plaintiff had any motive or design inconsistent with absolute honor and fair dealing. A better characterization would probably be a concealment without design. It is true that plaintiff testified that in her conversation with defendant's manager she referred to her trunks as baggage or luggage, but the mere use of this expression is insufficient to give notice to the defendant that the trunks contained articles of a character different from those ordinarily placed in trunks

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left for storage. Luggage and baggage are essentially the bags, trunks, etc., that a passenger takes with him for his personal use or convenience with reference to his necessities or to the ultimate purpose of his journey, and in this connection it has been held that, within limits, the same include such jewelry as may be adapted to the tastes, habits and social standing and be necessary for the convenience, use and enjoyment of the traveler either while in transit or temporarily staying at a particular place. The trunks here were to be stored and not to be used as luggage or baggage, and for this reason it is apparent that the above rule respecting jewelry is not applicable. Plaintiff insists that jewelry of the kind ordinarily worn upon the person is part of a woman's baggage and that defendant by undertaking to care for plaintiff's baggage became a bailee of the diamond pendant contained in one of the trunks, and cites in support of this contention the case of *Sherman* v. *Pullman Co.*, 79 Misc. Rep. 52; *Borden* v. *N. Y. C. R. R. Co.*, 98 id. 574, and *Hasbrouck* v. *New York C. & H. R. R. R. Co.*, 202 N. Y. 363. Were it admitted, or did the facts authorize a finding that the trunks of plaintiff were baggage or luggage, the contention would have much force. All the cases cited, however, were against common carriers, where the lost jewelry was carried by the plaintiffs as part of their baggage as passengers and they were entitled to have same safely transported by the defendants under the contract of transportation. The sole question in each of said cases was whether the personal jewelry constituted articles of baggage. In the instant case, as is above set forth, the trunks were not baggage or luggage. Plaintiff also claims that even though defendant may not have been informed of the presence of the pendant in the trunk, it would nevertheless be liable

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in an action for breach of the contract of bailment if the pendant were stolen by one of the employees of defendant, and that testimony in the case made it reasonably plain, or at least permitted the inference, that the pendant was stolen by one of defendant's employees. For this reason it is asserted the case should have been submitted to the jury. In support of this contention the case of *Heuman* v. *Powers Co.*, 226 N. Y. 205, is cited. The decision in the *Heuman* case is based primarily on the fact that the defendant, a common carrier, was obligated to safely carry plaintiff's goods, and that, notwithstanding the fact that plaintiff signed a memorandum stipulating to a limitation of defendant's liability to fifty dollars, such memorandum referred only to defendant's responsibility as a carrier and did not include the misfeasance or non-feasance of the carrier or its employees. In that case it was conceded that the jewelry was stolen by defendant's employees. It was further stated, though not necessary to a decision, that the failure of plaintiff to disclose to defendant the fact that there was a safe in the cabinet of plaintiff containing valuable articles did not relieve defendant from liability for its own acts or those of its servants which amounted to a misfeasance. It clearly appears, however, by reference to the opinion of the Appellate Division in the *Heuman* case that "one of the articles to be moved and which was apparently in full sight of defendant's representative at the time the contract was made or the order given was a small safe." In the instant case, as above stated, there was absolutely nothing to indicate to defendant the presence of valuable jewelry in the trunks of plaintiff. Somewhat analogous to the present case is *Robin* v. *Colaizzi*, 101 Misc. Rep. 298, where plaintiff visited defendant's restaurant with an escort and handed her

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pocketbook, which had in it eleven dollars in bills and a diamond ring, to her escort, and her escort put the pocketbook in his pocket and checked his overcoat in the coatroom. When he later asked for his coat the coat was returned to him, but the pocketbook was gone. The court said: "The question involved in this case is, under the circumstances here disclosed, did the defendant's intestate become the bailee of the lost pocketbook and its contents? None of the cases upon the subject relied upon by the plaintiff hold the defendant in such an action liable as bailee, unless he knew the lost article was in his possession or unless the article which he did receive was of such a character that the presence of the lost article or articles of a similar nature might be presumed." Similar cases are *Barnes* v. *Stern Bros.*, 89 Misc. Rep. 385; *Warmser* v. *Browning, K. & Co.*, 187 N. Y. 87. The reasoning in *Nathan* v. *Woolverton*, 69 Misc. Rep. 425; affd. on opinion below, 147 App. Div. 908, seems to be applicable here. The plaintiff in that case checked his trunk without noticing that it contained anything but ordinary personal baggage, whereas, in fact, it contained jewelry of considerable value. The court there held, following *Magnin* v. *Dinsmore*, 62 N. Y. 35, 44, that there was no contract between the passenger and the carrier so far as the jewelry was concerned, the defendant having no knowledge it was in its possession.

Motion denied.

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## Matter of the Estate of ANNIE FITZSIMMONS, Deceased.

(Surrogate's Court, Bronx County, December, 1920.)

**Wills — construction of — power of sale — equitable conversion — suspension of power of alienation — Real Property Law, § 42.**

A will empowered and directed the executor to sell and convey the real estate of his testatrix at such time as he might deem proper, "but not less than two years after my death," with direction to distribute the proceeds among designated legatees. *Held*, that the power of sale was mandatory and worked an equitable conversion of the real estate.

While under section 42 of the Real Property Law the limitation of the power of sale could not be given effect, the intention of the testatrix that her property should be sold and distribution made as provided by her will, could be carried out by eliminating the attempted unlawful suspension of the power of alienation, the limitation should be treated as directory merely and not as of the essence of the power of sale.

PROCEEDINGS on construction of a will under Code of Civil Procedure, section 2615.

William A. Keating, for petitioner.

SCHULZ, S. This proceeding was brought under the provisions of section 2615 of the Code of Civil Procedure to obtain a determination as to the validity, construction and effect of an attempted disposition of property contained in paragraph numbered "3" of the last will and testament of the decedent, which is as follows:

"3. I hereby direct and empower my executor hereinafter named to sell and convey, at such time as he may deem proper, but not less than two years after my death, and at such price as he may deem adequate, the premises where I now reside, and known as 644 East 229th Street, Borough of the Bronx, City of New

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York, and to distribute the net proceeds thereof after deducting all expenses of sale, in equal parts, share and share alike, between Mary Carney, Catherine Carney, and Louise Carney, all residing in the said Borough of the Bronx, and Mary Flannigan, Annie McNamara, and Catherine Ford, of the City of New Rochelle, Westchester County, New York, and Mary Connel, residing on Sixtieth Street, in the Borough of Manhattan, City of New York, the said named being my cousins."

It is contended that the phrase "but not less than two years after my death" means that the sale shall not be made before the expiration of two years after the death of decedent, and such contention appears to me to be correct.

The paragraph in question contains a mandatory power of sale, coupled with a direction to distribute the proceeds among the parties named and works an equitable conversion. *Salisbury* v. *Slade*, 160 N. Y. 278; *Greenland* v. *Waddell*, 116 id. 234, 240; *Lent* v. *Howard*, 89 id. 169. If the attempted limitation were given effect, the executor could not exercise the power of sale and hence could not alienate the said real estate for a period of two years after the death of the decedent; in other words, the absolute power of alienation would be suspended for a period of two years which is against the statute providing that such suspension cannot be for a longer period than two lives in being. Real Prop. Law (Cons. Laws, chap. 50), § 42; *Matter of Hitchcock*, 222 N. Y. 57. The limitation of the power of sale, therefore, cannot be given effect.

The fact that this is so, however, does not necessarily destroy the provisions of the will of which it is a part. The courts lean in favor of the preservation of such valid parts of a will as can be separated from

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those that are invalid without defeating the general intent of the testator. *Matter of Hitchcock, supra.* Where the parts of a will are so intermingled that the valid cannot be separated from the invalid, the will must fail, but when it is possible to eliminate the invalid provisions and leave the valid ones intact and to preserve the general plan of the testator, such a construction will be adopted as will prevent partial or total intestacy. *Matter of Thaw,* 182 App. Div. 368, 372.

The intention of the testatrix was that the property should be sold and that the cousins should share in the proceeds of the sale of the real estate in question and this can be carried out after eliminating the attempted unlawful suspension referred to. The limitation of the power of sale should be treated as directory merely and not as of the essence of the power itself. *Mott* v. *Ackerman,* 92 N. Y. 539; *Waldron* v. *Schlang,* 47 Hun, 252. The power of sale when freed from the provision which violates the statute, may thus be executed at any time, and upon such sale, distribution may be made as provided in the will. *Smith* v. *Chesebrough,* 176 N. Y. 317.

Decreed accordingly.

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Matter of the Taxation under the Acts in Relation to Taxable Transfers of the Property of GERARD BEEKMAN, Deceased.

(Surrogate's Court, Nassau County, December, 1920.)

**Transfer tax — what subject to — association for benefit of a family not exempt — Tax Law, § 221.**

The "Beekman Family Association" which was incorporated under the Membership Corporation Law by members of the Beekman family, including the testator, does not come

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within the class of corporations entitled to an exemption under section 221 of the Tax Law, and property passing to said association, as residuary legatee, is subject to a transfer tax.

APPEAL from an order assessing the transfer tax.

Herbert L. Fordham, for executors, and also for Beekman Family Association, appellants.

Jeremiah Wood, for state comptroller, respondent.

SMITH, Act. S. This is an appeal taken by the executors under the will of the above named decedent, and by the Beekman Family Association, the residuary legatee and devisee, from the appraisal and the order entered thereon and dated January 9, 1920.

If the property passing under the residuary provision of said will is to be wholly exempt from taxation, the reason for such exemption must be that the residuary legatee and devisee (the Beekman Family Association), comes within one of the classes of corporations specified in section 221 of the Tax Law, to wit: religious, educational, charitable, missionary, benevolent, hospital or infirmary corporations; and if not wholly exempt, but partially exempt, then it must come within the class of corporations entitled, under the said section, to a restricted exemption, namely, a corporation organized for moral or mental improvement of men or women, or for scientific, literary, library, patriotic, cemetery or historical purposes.

In order to determine the character of a corporation we must look to its charter, or in this case, to its articles of incorporation. *Matter of DePeyster,* 210 N. Y. 216; *People ex rel. Wall & H. St. R. Co.* v. *Miller,* 181 id. 328. This being a well-settled rule of law, it seems to me that what the testator did before his death in the way of conferring benefaction upon the Beekman Family Association and what application or use

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Misc.] Surrogate's Court, Nassau County, December, 1920.

the said association made of such gifts, and also what has been done since the testator's death by the directors of said association, should not be considered in determining the question now under consideration.

The Beekman Family Association was incorporated under the Membership Corporations Law about ten years ago by seven members of the Beekman family, including the testator. The said testator was a bachelor, and died on November 9, 1918.

By the third article of incorporation of said association, membership was restricted and limited to "All lineal descendants of William Beekman, who became in 1647 a resident of New Amsterdam, now New York City, when approved by a concurring vote of not less than five Directors." The phrase "The Beekman Family" by said article was made to include the wives and widows of said lineal descendants.

The objects of the corporation as declared by its articles of incorporation, are (1) To pay the expense of preparatory and professional education or other suitable education for members of the Beekman family as may be designated and approved by at least five directors of the corporation; (2) To furnish pecuniary aid exclusive of loans, to such poor and needy members of the Beekman family as may be designated and approved by at least five directors of the corporation; (3) To receive and hold, collect and preserve family portraits, heirlooms of the Beekman family, and matter connected with the history of that family; documents and books relating to the family, with power to add to and publish the same; and to designate and maintain a place of deposit for receiving, holding, collecting, preserving and exhibiting these portraits, heirlooms and matter connected with the history of the family and documents and books as an undivided collection; (4) To care for and maintain,

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improve and embellish such burial lots or places in cemeteries, including the erection of fences, monuments, structures and tombs thereon in which are interred the members of the Beekman family, as shall be designated and approved by at least five directors of the corporation, provided that at least one such burial lot or place shall always be cared for, maintained, improved and embellished by the corporation; (5) To support and maintain and educate a person or persons other than a member or members of the Beekman family and contribute towards the maintenance of educational institutions otherwise than for the education of members of the Beekman family, and to contribute to charitable and benevolent uses and to religious purposes as from time to time the board of directors shall deem proper and desirable; provided, however, that no such action as specified in this section (5) shall be taken unless expressly authorized by the by-laws of the corporation and then only by the concurring vote of all and at least seven directors.

It is contended that the first object above expressed is educational; that the second is charitable, the third historical, the fourth for cemetery purposes and that the fifth is educational, charitable, benevolent, religious and includes as those who may be the subject of beneficence, all persons who are not members of the Beekman family.

The test of a charitable gift or use and a charitable corporation are the same. *Matter of Rockefeller*, 177 App. Div. 786–791; *Matter of Altman*, 87 Misc. Rep. 255, 260.

"Many definitions of a charitable trust have been formulated, but all the definitions that have been attempted carry the implication of public utility in its *purpose*. * * * If the purpose to be attained is personal, private or selfish, it is not a charitable trust.

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When the purpose accomplished is that of public usefulness, unstained by personal, private or selfish considerations, its charitable character insures its validity." *Matter of MacDowell,* 217 N. Y. 454, 460. See, also, *Matter of Rockefeller, supra.*

It may well be that the testator intended his property passing under the residuary clause of his will should be used for charitable and educational purposes; but the prominent fact seems to me is that the subjects and objects of his beneficence were limited to his own kin. It is contended by counsel that the Beekman family is a clan and that it includes a class of persons much larger than those usually included in the word "family;" however, it does not seem to me that it makes any difference whether the words "Beekman family" include a large or small number of persons or whether those persons are remotely or closely related to the decedent; the fact is that the class referred to is limited to the decedent's kin. I see no reason why the directors of the association, if they so wished, could not apply the property to the education of the nearest relatives of the decedent to the exclusion of the remotest; likewise, I see no reason why the directors could not furnish pecuniary aid to the nearest relatives of the deceased provided they came within the class of poor and needy, to the exclusion of those remotely related to the decedent.

The third object, as above expressed, no doubt is historical. It is also genealogical, but like the first two objects is confined exclusively to the family of the decedent and has no public aspect.

The fourth object, it is true, was intended for cemetery purposes, but, like the foregoing provisions, is private and relates solely to the Beekman family.

The fifth object includes a very broad class. The fact is, however, that it is not necessary that one dollar

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of the property passing under the residuary clause of testator's will may ever be applied pursuant to the provisions of section 5; in fact, it would seem that the incorporators intended to make it difficult to apply any of the funds of the corporation for purposes which did not relate to the Beekman family; furthermore, the educational institutions there referred to might include private schools.

Counsel for the appellant has cited as his chief authority for his contention, *Matter of Rockefeller*, 223 N. Y. 563, which in my opinion is easily distinguishable from this case. In that case the character of the corporation under consideration as shown by its charter, was " for the purpose of receiving and maintaining a fund or funds and applying the income and principal thereof to promote the welfare of mankind throughout the world," and in no sense was the purpose of the corporation limited to a family.

Considering all of the objects as set forth in the articles of incorporation of the Beekman Family Association, I am forced to the conclusion that the Beekman Family Association does not come within the class of corporations contemplated by the statute as being entitled to exemption under the Tax Law.

I therefore conclude that the property passing under the residuary clause of the decedent's will is not entitled to exemption and that the order confirming the report of the appraiser fixing the transfer tax should be affirmed, with costs.

Order affirmed, with costs.

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## 400 MANHATTAN AVENUE CORPORATION, Landlord, v. WILLIAM DANZIGER, Tenant.

(Municipal Court of the City of New York, Borough of Manhattan, Seventh District, December, 1920.)

**Pleading — when defense stricken out — summary proceeding — lease.**

In a summary proceeding to dispossess a tenant for nonpayment of rent of a dwelling apartment in the city of New York, he must, at the time of filing an answer pleading that the rent is unreasonable, deposit one month's rent as reserved in the lease, and for failure so to do, the defense, on motion of the landlord, will be stricken out.

SUMMARY proceedings.

Jacob I. Berman, for motion.

Oscar Englander, opposed.

CRANE, J. This is a summary proceeding to recover possession of an apartment used for dwelling purposes in the city of New York after default in the payment of rent. The tenant sets up the defense that the rent is unjust, unreasonable and oppressive, which defense was created by chapter 136 of the Laws of 1920, as amended by chapter 944, Laws of 1920, and expressly authorized in a summary proceeding based upon a default in the payment of rent by chapter 945, Laws of 1920. The landlord moves to strike out the defense that the rent is unreasonable upon the ground that the tenant did not deposit one month's rent at the time the defense of unreasonable rent was interposed. The tenant contends that as a deposit is not expressly required by chapter 945 of the Laws of 1920 no deposit need be made in a summary proceeding, although he concedes that such deposit must be made

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as a condition precedent to setting up the defense in an action.

At the outset it is to be observed that chapter 945 does not create the defense. It was created by chapter 136 of the Laws of 1920. Chapter 945 merely gives express permission to a tenant to set up the defense so created in a summary proceeding, and further provides that when the defense is so interposed a bill of particulars must be filed by the landlord, something not otherwise required in a summary proceeding; but the incidents of the defense, as well as its character, are prescribed by chapter 136, as amended and continued by chapter 944; and all matters of procedure and all presumptions are applicable whether the proceeding be an action for rent or a summary proceeding based on the non-payment of rent. This would be so on well known general principles, for both statutes were passed by the legislature in a common scheme to remedy the same evil and must be read *in pari materia. People ex rel. Onondaga County Savings Bank* v. *Butler,* 147 N. Y. 164, 168, 169; *People ex rel. Jackson* v. *Potter,* 42 How. Pr. 260, 261, 262, 270; affd., 47 N. Y. 375; *Smith* v. *People,* Id. 330, 339.

But we are not compelled to rely on this principle of construction of statutes for a decision of this motion. Section 2244 of the Code of Civil Procedure, providing for an answer in a summary proceeding, reads in part: "Such defense or counterclaim may be set up and established [in a summary proceeding] in like manner as though the claim for rent in such proceeding was the subject of an action." Here is an express declaration that this defense of unreasonableness "may be *set up* * * * in like manner" as in an action for rent. Therefore as the deposit is required in setting up the defense in an action for rent, by the provisions of this section it is required in setting up

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the same defense in a summary proceeding. There is nothing unreasonable in such a construction. The Legislature has lengthened the time of the return of a precept so that it shall be returnable in not less than five nor more than ten days. Laws of 1920, chap. 952. A summons in the Municipal Court must be answered in five days. A jury trial may be demanded in a summary proceeding just as in an action, and the delay incident to the congested conditions in this court is likely to be as great in one case as in the other. Each proceeding terminates in a warrant for the recovery of possession from the occupant. It is entirely consonant with justice to require the same security for the rent in one case as in the other.

The motion to strike out the defense will, therefore, be granted unless within five days after the service of the order to be entered hereon the tenant deposits with the clerk of this court the rent reserved in the agreement under which he obtained possession of the premises.

Ordered accordingly.

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## Matter of the Guardianship of FRANCIS S. MCGUIRE, an Infant.

(Surrogate's Court, Bronx County, December, 1920.)

**Guardians — who may be appointed — infants — wills — Code Civ. Pro. § 2649.**

Upon an application for the appointment of a guardian of the person and estate of an infant, the fundamental and paramount consideration must be the welfare and best interests of the infant.

Where it is made to appear that the welfare and interests of the infant will be best served by the appointment of some one other than the petitioner, though not a relative, all other considerations must give way.



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Where it appears that the interests of an infant between the ages of thirteen and fourteen years will be best served by the appointment of either his maternal grandmother or a paternal aunt, and the infant expresses a preference for his grandmother, she will be appointed guardian of his person and under section 2649 of the Code of Civil Procedure the executor and trustee under the will of the father of the infant may be appointed guardian of the infant's estate.

PROCEEDINGS on appointment of guardian for infant.

George H. Taylor, Jr., for Maria L. O'Sullivan, petitioner.

Edward J. McGuire, for Irving National Bank.

Joseph L. Young, for Lillian M. Hynes.

SCHULZ, S. Application is made by the maternal grandmother of an infant for her appointment as the general guardian of his person and estate. A paternal aunt opposed the same and asked for her appointment. Upon the hearing the respondent, through her counsel, stated that in view of the infant's preference as hereinafter set forth, she would not insist upon her own appointment but would present such evidence as she had to the court to aid it in deciding what, under all of the circumstances, is for the best interests of the infant.

No question is raised as to the eminent respectability of any of the parties, and I am satisfied that they are all actuated by the best of motives, namely, love for the infant, and a desire that the action taken shall be for his good.

Upon applications of this character due consideration should be given to the relationship of the applicant to the infant (*Ledwith* v. *Ledwith*, 1 Dem. 154; *Smith* v. *Smith*, 2 id. 43; *Morehouse* v. *Cooke*, 1 Hopk.

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Ch. 226); to the wishes of the infant himself, if of sufficient age and intelligence (*Osterhoudt* v. *Osterhoudt,* 48 App. Div. 74, 77; *Israel* v. *Israel,* 38 Misc. Rep. 335, 338; *Matter of Burdick,* 41 id. 346); to the religious belief of the infant and the applicant (*Matter of Crickard,* 52 id. 63, 66; *Matter of Mancini,* 89 id. 83; *Matter of Lamb,* 139 N. Y. Supp. 685); to the financial condition of the parties, and to the possible home surroundings of the infant in the event of the appointment. *Matter of Watson,* 10 Abb. N. C. 215; *People ex rel. Brush* v. *Brown,* 20 Wkly. Dig. 516.

The fundamental and paramount consideration, however, as all of the authorities agree, must be the welfare and the best interests of the infant (*Matter of Gustow,* 220 N. Y. 373; *Matter of Lee,* Id. 532; *Ullman* v. *Ullman,* 151 App. Div. 419; *People ex rel. Pruyne* v. *Walts,* 122 N. Y. 238) and where it appears that the same will be best served by the appointment of some one other than the petitioner or the respondent, even if that person be unrelated to the infant, all of the other considerations must give way. *Matter of Gustow, supra; Matter of Vandewater,* 115 N. Y. 669; *Holley* v. *Chamberlain,* 1 Redf. 333.

The petitioning grandmother is nearer in relationship to the infant than is the aunt. The infant is over thirteen years and five months old, so that he is almost of the age when under the Code (§ 2645) he could have petitioned for his own guardian and he is a boy of exceptional intelligence for his years. It was shown that upon an inquiry made by the family, to which the petitioner and her daughter were invited but at which they were not present, and in the presence of the respondent and other relatives who favored the respondent's appointment, the infant stated that his preference for guardian was his grandmother, the petitioner herein, and upon his examination in open

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court he made the same statement. There is no difference in religious belief, and while the financial condition of the petitioner does not appear to be as good as that of the respondent, I deem that fact of no great importance, taking into consideration the probable amount available for the infant's support, maintenance and education. It is true that the petitioner is more advanced in years than the respondent, it being stated that she is upwards of seventy-five years old, but she is unusually well preserved both physically and mentally and her household consists of herself and a daughter, the latter being an aunt of the infant, who for many years was a school teacher.

As I believe that the interests of the infant would be well served by the appointment of either the petitioner or the respondent, I think that in view of the relationship and there being no other objection that I deem decisive, the wishes of the infant should, as far as possible, be given effect. The application of the grandmother will, therefore, be granted in so far as it is for her appointment as guardian of the person of the infant.

I have been favorably impressed by the demeanor and actions of the parties to the proceeding as well as by the commendable conduct of Dr. Higgins and the other relatives throughout this controversy, and I bespeak for the infant, who, through a most deplorable accident remains as the sole representative of his immediate family, a continuance of the same love and interest in his welfare which was so strikingly manifest at the hearing.

The executor and trustee under the will of the father of the infant states that it intervenes in this proceeding and asks that it be appointed the guardian of the infant's estate. The petitioner expressed her willingness that some one other than herself be appointed in

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that capacity, but questioned the advisability of appointing the trustee, and without impugning in any way the motives, good faith and responsibility of the latter, suggested the advisability of appointing someone else, fearing that there might, at some time, be a clash between its interests as such guardian and as trustee.

Upon the argument of the motion, I did not have the will of the testator before me. An examination of the same shows that the trustee's duty will be, among other things, to collect the income of the trust fund and apply the same to the use of this infant, so that the appointment of some corporation other than the trustee would involve a payment by the trustee to the guardian of the estate, which in turn would expend the same for the infant's maintenance, support and education. The infant's estate, other than that which he receives through the medium of the trust in his father's will, is stated to be about $3,500. To appoint some other corporation would seem to me to needlessly complicate matters and might perhaps lead to additional and unnecessary expense which can and should be avoided. I deem the possibility of a conflict of interest in which the rights of the infant would not have the full protection of the court, so remote as to be of little weight in reaching a conclusion. The situation is a good deal like that in *Bennett* v. *Byrne,* 2 Barb. Ch. 216, 219, where the court said: "Here the appellant was already the trustee of the infant, to expend the income of the mother's estate in his support and education. And the appointment of any other person as guardian might subject the infant to the expense of separate accounts of the expenditures for his support; the one on the part of the executor and trustee of the mother, who was charged with the support and education of the infant out of the income of the property

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bequeathed by her, and the other by the guardian of the estate which came to the infant directly from his father. It would also be likely to lead to collisions between the executor and the guardian, as to what expenditures were necessary and proper for the infant, and as to the manner in which he should be brought up and educated. For each would have a discretion to exercise, upon the subject of necessary expenditures for those purposes."

As I have the authority to appoint someone other than the person for whose appointment the petition prays (Code Civ. Pro. § 2649; *Ledwith* v. *Ledwith, supra; Matter of Wyckoff*, 67 Misc. Rep. 1; *Matter of Vandewater*, 27 Wkly. Dig. 314; appeal dismissed, 115 N. Y. 669) and the petitioner having in effect consented to the appointment of someone else, and believing that the best interests of the infant make the appointment of the trustee as such guardian advisable, it will be appointed guardian of the infant's estate.

Decreed accordingly.

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## Matter of the Estate of A. PAUL KEITH, Deceased.

(Surrogate's Court, New York County, January, 1921.)

**Transfer tax — what subject to — non-residents — Tax Law, § 220(3).**

Where a non-resident testator left a taxable estate in this state, the proper basis under section 220(3) of the Tax Law for prorating the various amounts taxable on the transfers under the will, is the total amount of the real and personal property transferred, and where the transfer tax appraiser did not include the real estate in his computations, the matter will be remitted to him for correction.

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In a transfer tax proceeding the appraised value of the entire estate should be submitted under oath and not in the form of a letter by the attorney for the executors, setting forth his estimate of such value.

APPEAL from an order fixing the transfer tax.

Maurice Goodman, for executors.

Lafayette B. Gleason (Schuyler C. Carlton, of counsel), for State Comptroller.

FOLEY, S. On this appeal the question arises as to the construction of section 220, subdivision 3, of the Tax Law. The decedent, a non-resident, left a net taxable estate in New York, fixed by the appraiser in his report at $363,271.60. In prorating the various amounts taxable on the transfers, the appraiser adopted the ratio between the property in New York and the entire personal estate, wherever situated. The executors claim that the proper basis for computing this ratio is the total amount of real and personal property transferred. The subdivision provides as follows: "Whenever the property of a resident decedent or the property of a non-resident decedent within this state, transferred by will, is not specifically bequeathed or devised, such property shall, for the purposes of this article, be deemed to be transferred proportionately to and divided pro rata among all the general legatees and devisees named in said decedent's will, including all transfers under a residuary clause of such will." This amendment was adopted to prevent the abuse, which existed before its enactment, by reason of executors arbitrarily choosing to pay certain legacies exempt by our law out of the New York assets. The purpose of the legislature was to provide for an equitable marshalling of the assets and

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to prevent the efforts of executors " to defeat the tax or reduce its amount by electing to devote particular parts of the estate to satisfy particular legacies." *Matter of Porter,* 67 Misc. Rep. 19. The law intends that the property shall be deemed transferred proportionately to and divided *pro rata* among all the legatees and devisees other than specific legatees and devisees. This comprehends the cash value of both the realty and personalty transferred. The comptroller's contention that the personal property is primarily liable for the payment of legacies has no application to this estate, for all the property is disposed of by the will. His construction would again create the discrimination sought to be cured. Such discrimination, however, would be exercised by the state and not by the representatives of the estate. The use of the word " devisees " is significant as showing a clear legislative intent to include the passing of real estate. The fallacy of the method of computation used by the appraiser is apparent, because the amount of the transfer passing to the residuary legatees is actually much larger (by reason of the omission of real estate) than the sums which he has adopted. All the other legatees suffer by this error. It is immaterial that in this estate the transfers to the legatees happen to be exempt. If they had not been exempt the general scheme of proportional division of the property subject to taxation in New York would be even more apparent. Although this method of computation has been used for some time, no objection to it seems to have been taken previously.

The appraiser erred, therefore, in not including the real estate in his computations. The matter is remitted to him for the purpose of taking proof as to the total value of all the general legacies and the residuary legacies transferred under the will. Incidental to

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this question upon the rehearing the appraised value of the entire estate should be submitted under oath and not in the form of a letter supplied by the attorney setting forth his estimate thereof.

Appeal sustained.

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## Matter of the Estate of BENJAMIN LICHTENBERG, Deceased.

(Surrogate's Court, New York County, January, 1921.)

**Accounting — testamentary trustees — wills — real estate.**

Upon the accounting of testamentary trustees, about thirteen years after the death of their testator, as to unproductive and unimproved real estate situated in a sister state, which though they were in duty bound to sell they still held undivided, the annual taxes and carrying charges are properly chargeable to and should be paid with interest out of the principal.

Upon a future accounting after a sale of the real estate within six months from the date specified in an order directing the trustees to sell, they may be reimbursed from the proceeds of the sale.

PROCEEDING upon the judicial settlement of the account of trustees.

Masten & Nichols, for petitioner.

Edwin C. Mulligan, for C. Ersa Mongini, objector.

Eliphalet W. Tyler, for Benjamin Lichtenberg.

Robert J. Farrington, for J. Chester, A. A. Lichtenberg, and Hortense C. Lichtenberg.

FOLEY, S. On a former accounting it was held by Surrogate Fowler (*Matter of Lichtenberg*, 171 N. Y.

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Supp. 570) that the deficit in the operation of the New York realty was properly chargeable to principal, as that property was included in an entirely different trust from the trust consisting of personalty set up for the widow. The surrogate further held it was improper to invade the income of one trust to pay the carrying charges of property held in another trust. This decree was not appealed from. The accounts now before the surrogate include the unproductive and unimproved real estate in Seattle. On this accounting objection is made by the widow that the trustee has deducted the annual taxes from income due her, and she asks that all the carrying charges be charged to principal. The real estate involved here is still held undivided by the trustee. The devisees of the one-half, which vested on the death of Moses, refused to accept undivided interests, and the trustee has since been unable to sell the property to advantage.

The will of the testator sets forth that all provisions for the widow were made in lieu of dower and in compliance with an ante-nuptial agreement. An income sufficient for her support was therefore contemplated by the testator. While the trust fund of personalty amounts to $66,716.41, the widow has received no income since July, 1919. The retention of this real estate, over which the trustee has a power of sale, imperils the life interest of the widow, and the payment of taxes is at present depriving her of any income. A continuation of this policy will benefit the remaindermen alone. Although the property in question was owned by the testator, his will provides, "No part of my estate shall be invested in unimproved property." Evidently the testator did not intend to have this unproductive real estate remain permanently in the trust fund. His will further gave his trustees "full power and authority to sell, mort-

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gage, lease or otherwise dispose of any and all real estate of which I may die seized, and they may deem fit; also to change any and all investments without any personal liability on the part of them or either of them." That the trustees have a power of sale cannot be seriously disputed, even though the trust as to one-half has terminated. *Furniss* v. *Cruikshank*, 191 App. Div. 450, cited by counsel for remaindermen, is not in point. In that case the trustees had divided the property and set up separate trusts, and the income from the productive property was sufficient to support the widow. The plain intention of testator in the will, therefore, justifies a departure from the general rule requiring payment of taxes and carrying charges out of income. *Spencer* v. *Spencer*, 219 N. Y. 459; *Lawrence* v. *Littlefield*, 215 id. 561. In view of the decision of Surrogate Fowler, acquiesced in by all the parties, and for the other reasons just stated, I am of the opinion that the taxes and charges are properly chargeable to and should be paid, with interest, out of principal. *Spencer* v. *Spencer*, 183 N. Y. Supp. 870, 873. Reimbursement may be provided for in a future accounting from the proceeds of the sale of the realty when a sale is had. Almost thirteen years have elapsed since the death of the testator without a complete disposition of this property. The trustees were bound to sell this realty, and this should be done at the earliest opportunity. The decree to be submitted should contain a direction to sell the real estate within six months from October 29, 1920, as stipulated by all the parties in open court.

Decreed accordingly.

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T. J. FLETCHER JACKSON and GERTRUDE H. M. JACKSON, Landlords, Respondents, *v.* EDNA GREY, Tenant, Appellant, and ALTA BRENNAN et al., Under-tenants.

(Supreme Court, Appellate Term, First Department, November, 1920, Term — filed January, 1921.)

**Summary proceedings — when will not lie against tenant on the ground of expiration of term — landlord and tenant — lease — Code Civ. Pro. § 2231(1-a) added by Laws of 1920, chap. 942.**

Under section 2231 of the Code of Civil Procedure, as amended by chapter 942 of the Laws of 1920, by adding subdivision 1-a to the effect that no summary proceeding "shall be maintainable to recover the possession of real property * * * occupied for dwelling purposes," summary proceedings on the ground of the expiration of the term will not lie against the tenant of several floors of a private house which have been sublet and are used exclusively for dwelling purposes, and a final order in favor of the landlord will be reversed and final order directed in favor of the tenant.

APPEAL by tenant from a final order of the Municipal Court of the city of New York, borough of Manhattan, fifth district, in favor of the landlords.

David G. Godwin, for appellant.

Randolph M. Newman (Leonard Klein, of counsel), for respondents.

BIJUR, J. This proceeding was brought to dispossess the tenant on the ground of expiration of her term. The determinative consideration in the case is the application of chapter 942 of the Laws of 1920 (one of the housing acts), which amended section 2231 of the Code of Civil Procedure by adding subdivision 1a, to the effect that no summary proceeding "shall be

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maintainable to recover the possession of real property * * * occupied for dwelling purposes," except in instances not relevant to the present case. It appears that the premises here involved are the second and third floors of a private house at No. 132 West Eighty-seventh street, which the tenant has sublet to a number of subtenants, and that the same are used exclusively for dwelling purposes. It seems to me to be perfectly clear that these premises fall within the description of the statute quoted, and that, therefore, summary proceedings will not lie. The respondent urges that as between the landlords and this particular tenant the tenant "made a business" of subletting furnished apartments. The statute does not, however, recognize the nice distinction thus sought to be superimposed upon it. In my opinion it was the intention of the legislature to forbid the bringing of summary proceedings in respect of premises occupied for dwelling purposes, and no distinction was made between lessees and any number of sublessees. The manifest purpose of the statute would be frustrated if the tenancy here in issue could be disturbed with the consequent disturbance of the occupation by the undertenants, while no useful purpose would be subserved by such a proceeding, except, possibly, to enable the landlords to succeed without compensation to "the business" of the tenant in subletting the apartments.

Judgment reversed, with thirty dollars costs and final order directed in favor of the tenant.

MULLAN, J., concurring in result.

Judgment reversed, with thirty dollars costs.

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ADOLPH BULOVA, Appellant, v. E. L. BARNETT, INC., Respondent.

(Supreme Court, Appellate Term, First Department, December, 1920, Term — filed January, 1921.)

**Pleading — when demurrer sustained — services — corporations — assignments — Stock Corporation Law, § 66.**

Unless it appears in an action to recover upon an assigned claim for services rendered and material furnished by plaintiff's assignor, a corporation, that plaintiff was an officer, director, stockholder or a creditor of the corporation, the assignment is not null and void under section 66 of the Stock Corporation Law and said statute is not a defense to the alleged cause of action.

A separate defense, pleading that the assignment set forth in the complaint, was executed by one H. while he was assuming to act as the vice-president of the corporation, and was received by plaintiff with full knowledge and notice of intention to give him a preference "as an alleged creditor" over other creditors of the corporation, and for that reason the assignment is null and void, is provable under the general denial in the answer, and an order overruling a demurrer to the separate defense will be reversed and the demurrer sustained with leave to serve an amended answer.

APPEAL by plaintiff from that part of an order of the City Court of the city of New York overruling plaintiff's demurrer to the fourth defense.

Sanford H. Cohen (George Cohen, of counsel), for appellant.

Frederick W. Sparks, for respondent.

GUY, J. The action is to recover for services rendered and materials furnished to defendant by the plaintiff's assignor S. S. Corporation. As a fourth

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defense defendant set up in its amended answer that the alleged assignment mentioned in the complaint was executed by one Henschel purporting to act as vice-president of the assignor corporation to the plaintiff, " who then claimed to be a creditor " of the corporation; that the corporation was insolvent and had refused to pay its notes and other obligations, and that the alleged assignment set forth in the complaint was executed by the said Henschel while he was assuming to act as the vice-president of the S. S. Corporation, and was received by the plaintiff with full knowledge and full notice, and with the intent of giving him a preference " as an alleged creditor " over other creditors of the corporation; and that by reason thereof the alleged assignment was and is null and void.

The case has been before this court and before the Appellate Division on motions to strike out portions of the original answer and for similar relief. 111 Misc. Rep. 150; 193 App. Div. 161. On these prior appeals the defense now before the court was the fifth defense in the original answer; and it was held by both this court and the Appellate Division that as the defense was a plea of confession and avoidance under section 66 of the Stock Corporation Law the denials which were made a part of the defense in the original answer should be stricken out. The court below, however, without expressly deciding that the plea constitutes a defense, has held that the defense is provable under defendant's general denial and overruled the demurrer.

It remains to be considered whether an assignment made by the corporation under the circumstances " is null and void." The acts prohibited by section 66 of the Stock Corporation Law, in so far as relevant to a consideration of this appeal, are cor-

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porate transfers to officers, directors or stockholders for the payment of any debt or upon any other consideration than the full value of the property paid in cash, and transfers by insolvent corporations with the intent of giving a preference to a creditor over other creditors of the corporation; and unless it appears that the plaintiff was an officer, director or stockholder or a creditor of the corporation the case would not come within the statute, and the statute would not be a defense to the alleged cause of action. While the theory of the pleader is that the plaintiff was a creditor of the corporation it is not alleged in the defense that the plaintiff was a creditor, the only reference to the plaintiff in that regard being that he "claimed to be a creditor" and that the assignment was made to him with the intent of giving him a preference "as an alleged creditor." The complaint alleges the making of the assignment to plaintiff for a valuable consideration. Assuming, however, that the defense sets up a transfer within the statute, while the precise point does not seem to have been squarely decided, the trend of judicial construction of the act indicates that as to a corporate debtor, such as the defendant in this action, such a prohibited transfer would not be void in the sense that the assignee could not maintain suit for the recovery of the assigned claim. A contrary construction would impose a perilous burden upon corporate debtors ignorant of the details of the internal management of a corporation assignor and subject them to the hardship of a double payment. To hold the preferential assignee accountable to the creditors (as the statute expressly does in this case) and to permit a debtor to pay an indebtedness upon an assignment valid on its face seems more in accord with the spirit of the statute.

Our attention has been called to a decision of the

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Appellate Division rendered in this case since the argument, which determines that the S. S. Corporation, the plaintiff's assignor, must be permitted to intervene in this action in order to litigate its claim that the assignment to the plaintiff was made in fraud of its own creditors and is therefore void as against it. Nothing contained in that opinion seems to us to support the defendant's contention herein. On the contrary, if this defendant is in a position to raise the same defense which the S. S. Corporation seeks to raise, there would be no reason to permit the S. S. Corporation to intervene for the Appellate Division expressly states in its opinion that as a matter of fact the S. S. Corporation has already succeeded by reason of circumstances not disclosed in our present record, to all the interest of the defendant in this action and would therefore be in a position to take over the defense of this action and to derive the benefits of any judgment in the defendant's favor.

Order in so far as appealed from reversed, with ten dollars costs and disbursements, and demurrer to the fourth defense sustained, with ten dollars costs, with leave to defendant to serve an amended answer within six days after service of a copy of the order entered hereon

Order reversed, with ten dollars costs and disbursements.



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163 EAST 36TH STREET CORPORATION, Respondent, v. FRANK PARKER STOCKBRIDGE, Appellant.

(Supreme Court, Appellate Term, First Department, December, 1920, Term — filed January, 1921.)

**Counterclaim — landlord and tenant — failure to give possession — damages — evidence.**

Where in an action to recover rent of an apartment under a written lease the evidence justifies a finding that because of the acts of the landlord, its contractors and servants, the tenant was not given possession of the apartment on time, he is entitled to counterclaim his damages for the time he was kept out of possession.

Where the court refused to submit the counterclaim to the jury and directed a verdict in favor of the landlord for the amount of rent claimed, the judgment entered on the verdict will be reversed and a new trial ordered.

APPEAL by defendant from judgment of the City Court of the city of New York on verdict directed for plaintiff and from order denying motion for new trial.

Edwards, Murphy & Minton (Joseph F. Curren and John McKim Minton, Jr., of counsel), for appellant.

G. Arnold Moses, for respondent.

GUY, J. In this action by landlord for rent of an apartment the tenant sought under his counterclaim to prove his damages for the landlord's failure to give him possession of the apartment for the period beginning October 1, 1919, the first day of the term, and December twelfth, following. The lease, which is dated August 18, 1919, is of "the apartment known as the first floor of the building 163 East 36th Street,

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New York City," for the term of three years, to be used and occupied by the tenant upon the condition mentioned in the lease.

The tenant testified that on October first he asked plaintiffs' treasurer McGrath when the tenant was going to be able to get into the premises and McGrath replied "within a week or ten days;" that on October first, there were no windows and no doors in the apartment; floors not laid; tile floors in the bathroom and kitchen not laid; hearths not laid; much of the plumbing not installed, and the plastering only partly done; that the tenant observed in the apartment various accumulations of lumber, door frames, window frames, doors, windows, mantles, flooring, tools and equipment for work of all kinds not pertaining to the apartment; that on September twenty-sixth he had put in some of his furniture, and that either on October first or subsequent thereto there was furniture belonging to other tenants of the building in the apartment; that the use of the apartment for the storage of building materials and other people's furniture was a continual process for many weeks. The tenant further testified that he was at the premises almost every day for some weeks after the first of October; that he saw McGrath there frequently during October and November; that on each occasion he asked McGrath when he was going to let the tenant into the apartment and that plaintiffs' treasurer replied either "in a few days" or "think one week or two weeks;" that once or twice McGrath said "you can positively get in here within a week or ten days;" and that McGrath would enter into explanation as to why he was unable to deliver the apartment, stating that it was because of delays encountered in the construction work; that the plastering was not completed until well toward the end of November, and the painting not done until

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December twelfth, and the carpenter work not finished until two days afterwards; that paints were mixed in one of the rooms; that he obtained the keys of the apartment December eleventh; that he frequently saw McGrath in the apartment after October first, also workmen doing plastering work and plumbing and other work.

The court refused to submit the counterclaim to the jury and directed a verdict for the landlord for $1,050, the amount of the rent claimed.

The tenant made out a *prima facie* case on his counterclaim. An apartment in a tenement house is let and hired for human habitation, and in the light of the law applicable to the construction and occupation of such houses and the proof given by the defendant is was undoubtedly the intention of the parties to the lease that the premises demised were a completed apartment, and not merely a space on the first floor without windows, doors or floors, bounded by unplastered walls and lacking the necessary plumbing. Further, the jury would have been authorized in finding that the tenant was prevented from taking possession because of the acts of the landlord, its contractors and servants. In either aspect the tenant waiving rescission would be entitled to his damages. *Meyers* v. *Liebeskind,* 46 Misc. Rep. 272; *Kopelman* v. *Gritman,* 76 id. 188; *Frank* v. *Morewood Realty Holding Co.,* 89 id. 425.

LEHMAN and WAGNER, JJ., concur.

Judgment and order reversed and new trial ordered, with costs to appellant to abide event.

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## LETA D. POTTER, Appellant, v. AMERICAN UNION LINE, INC., Respondent.

(Supreme Court, Appellate Term, First Department, December, 1920, Term — filed January, 1921.)

**Ships and shipping — contracts for towage — principal and agent.**

The captain of a schooner has implied power to bind his own principal by a contract for the towage of the ship.

Where the captain of a schooner made a contract with plaintiff to tow the ship, the person for whose benefit the ship is operated on the particular voyage in which the expense for towage was incurred, not the actual owner of the ship, is the principal of the captain and is liable upon the contract for towage

Where payment for the services rendered was refused on the ground that defendant was not the owner of the schooner and that the captain was not defendant's agent but the agent of the actual owner, a judgment dismissing the complaint will be reversed and judgment directed in favor of plaintiff.

APPEAL by the plaintiff from a judgment of the Municipal Court of the city of New York, borough of Manhattan, first district, dismissing the plaintiff's complaint with costs to the defendant.

Foley & Martin (William H. Darrow, William J. Martin, of counsel), for appellant.

Engel Brothers (Isidore Schneider, of counsel), for respondent.

LEHMAN, J. The plaintiff was employed by the captain of the schooner *James W. Elwell* to tow the schooner from some place in the harbor of New York to the Fairway buoy outside of Sandy Hook, for the sum of $150. The captain indorsed upon the plain-

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tiff's bill for this service the words "Am. Union Line, 11 Broadway, to sea from Red Hook, as agreed, $150. A. C. Clark, Master." There is no claim that the plaintiff did not render the services for which he was to be paid the sum of $150, and there is no claim that the captain did not have implied and apparent authority to contract with the plaintiff for these services, but the defendant refuses to pay the plaintiff's claim on the ground that it was not the owner of the schooner, and the captain of the schooner was not its agent, but the agent of the actual owner, the Northland Navigation Company, and that consequently no contract made by the captain, even though such contract purported to be made by him as agent for the defendant, is binding upon it. There can be no doubt that the captain of a schooner has the implied power to make contracts necessary and proper in the navigation of the ship which will be binding upon the ship's owner. The term "owner" when used in this connection does not mean necessarily the person in whom the legal title to the ship is vested, but rather the person for whose benefit the ship is operated on the particular voyage in which the expense is incurred, and who during that time has the direction and control of the ship, its officers and crew. The legal presumption is in favor of the continuance of ownership and control by the general owners of the ship, but where the evidence shows that there has been a parting with the possession of the ship so that during the voyage the absolute owner has surrendered his control over her, the officers of the ship become the agents of the special owner for the voyage, and have implied power to bind him and not the general owner. *Hagar* v. *Clark*, 78 N. Y. 45. The question, therefore, which is to be determined in this case involves simply the ordinary rules of agency. The captain of the ship had implied power

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to bind his own principal, and the court was simply called upon to determine whether the defendant or the Northland Navigation Company was the captain's principal.

The burden of proof naturally rested upon the plaintiff, and in order to meet this burden he showed by undisputed and documentary evidence that this defendant had contracted in its own name with the French high commission for the transportation of freight during the war; that all arrangements in regard to this freight were made by defendant's servants; that it received in its own name payment of all freight charges, and that it paid all expenses including the wages of the captain. The plaintiff further showed that the defendant corresponded in its own name with the United States shipping board and made application to them to place the schooner *Elwell* on berth for Grecian ports with general cargo, and guaranteed that after the vessel's outward voyage, it would return by such route as directed by the chartering committee of the United States shipping board. It is true that the letters to the United States shipping board show that the defendant did not claim to be acting as the general owner of the ship, but they did show that the defendant claimed the right to control the course of the ship. The trial justice held, and in my opinion held correctly, that this testimony was sufficient to show *prima facie* that the defendant was in control of the schooner, and, therefore, in a legal sense the principal of the captain during this voyage. Thereupon the defendant produced its secretary and treasurer to rebut the plaintiff's testimony and the inference that might be drawn therefrom. He testified that the Northland Navigation Company was the owner of the schooner, that the defendant acted only as agents for the owners and signed the bills of lading

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for freight on this ship, with the word "agents" after their name, that the captain was in charge of the vessel for the owners, the Northland Navigation Company, though the defendant paid his salary, and in fact received all the moneys and paid all the expenses. He also testified that after the defendant received all the moneys and paid out all the expenses, the defendant "rendered a statement to the Northland Navigation Company showing the expenditures and the income." It is to be noted that his testimony that the Northland Navigation Company, and not the defendant, was the owner of the ship, that the defendant acted only as agent for the Northland Navigation Company, and that the captain of the ship was in charge thereof for the Northland Navigation Company, involved merely conclusions of law and not evidence. The only facts to which this witness testified and which would constitute evidence to be considered by the trial judge in determining the question before him was that the defendant signed the bills of lading with the description of agents after their name, and that the defendant rendered a statement to the Northland Navigation Company showing the expenditures and the income. If in fact the defendant had complete control and right to possession of the schooner, the fact that they chose to describe themselves as agents on the bill of lading would have no magic effect in exempting them from liability on contracts made by their duly authorized agents. On the other hand, if the defendant was merely acting for the benefit of the Northland Navigation Company and required to account to its principal for its receipts and expenditures and to pay over all the profits to its principal, then it is not liable upon the contracts made by agents whom it employed, not as its own servants, but as servants of its principal. Apparently the trial justice

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has held that the defendant's testimony that it rendered a statement to the Northland Navigation Company of expenditures and income was sufficient to show that the defendant was only the agent of the general owner and to rebut any inference which might otherwise have been drawn from the plaintiff's testimony. Possibly if the defendant's testimony that it rendered a statement of the income and expenditures to the Northland Navigation Company was not explained or shaken upon cross-examination it might lead to the reasonable inference that the defendant was bound to render such an account and to pay over the surplus in whole to the Northland Navigation Company, or in other words, that the Northland Navigation Company was at all times the owner of the ship and the receipts received therefrom and the defendant merely its agent; though it would seem that if that were the fact, the defendant, which must be in possession of all the evidence necessary to show the true relations between the parties, could have produced testimony to show exactly what the defendant was required to do and actually did in connection with the management and control of this ship. We need not, however, now decide this question, because on cross-examination this same witness, the defendant's secretary and treasurer — and it may be said incidentally that he is also an officer of the Northland Navigation Company, which maintains its offices in the same building as the defendant — testified: "The Northland Navigation Company had no bank account. They were only the holding company." It seems to me that this final testimony of the defendant completely establishes the plaintiff's cause of action. The Northland Navigation Company was only the holding company. The defendant contracted for the freight in its own name, received payment for that freight in

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its own name, paid all the expenses of the ship, and held itself out to the United States government as authorized to guarantee the route of the ship on the return voyage, and I cannot see how it can be claimed that the evidence is sufficient to show that in all these transactions it was merely acting as the agent of a company which it admits was only a holding company and had not even a bank account. The very failure of the defendant to produce evidence to show the actual relations it bore to this holding company justifies the inference that such evidence, if produced, would not have been favorable to it. Under the circumstances I feel that the judgment is contrary to the evidence and the law, and should be reversed, with $30 costs to appellant, and judgment directed in favor of the plaintiff in the sum of $150, with interest and costs.

GUY and WAGNER, JJ., concur.

Judgment reversed, with thirty dollars costs to appellant.

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WILLIAM B. MAY and Another, etc., Appellants, *v.* GERTRUDE DERMONT, Respondent.

(Supreme Court, Appellate Term, First Department, December, 1920, Term — filed January, 1921.)

**Statutes — construction of — meaning of words "occupied for dwelling purposes" — summary proceedings — landlord and tenant — Laws of 1920, chap. 942.**

Although the legislative intent in the use of the words "occupied for dwelling purposes" in the statute (Laws of 1920, chap. 942) by which a landlord's remedy by summary proceedings is suspended, etc., means an occupation *by the tenant* for such purposes, and the statute should not be so construed as to include premises which are occupied by the tenant for the pur-

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pose of providing dwelling or shelter to others for the tenant's profit, the legislature did not intend, however, to exclude from the operation of the statute premises occupied as a dwelling, not only by the tenant, but also by self-supporting members of the family or paying guests not related and perhaps strangers to the tenant, so long as such renting of the premises is merely incidental to the tenant's occupation.

APPEAL by the landlords from an order of the Municipal Court of the city of New York, borough of Manhattan, third district, dismissing the petition in a summary proceeding.

Everett, Clarke & Benedict (A. Leo Everett, of counsel), for appellants.

Campbell & Boland (Charles J. Campbell, of counsel), for respondent.

LEHMAN, J. The landlord has brought a summary proceeding to recover possession of a house leased to the defendant after the expiration of the defendant's term. At the trial the petition was dismissed on the ground that the landlord's remedy by summary proceeding was suspended by chapter 942 of the Laws of 1920. That statute provides that in view of the existing public emergency no summary proceeding "shall be maintainable to recover the possession of real property * * * occupied for dwelling purposes" except in certain contingencies; and the only question in this case is whether the house leased by the tenant is "occupied for dwelling purposes" within the meaning of the statute.

No evidence was presented at the trial, but the tenant conceded, and the landlord has accepted the concession, that the premises which the landlord seeks to recover are "a house in the City of New York occupied for dwelling purposes and for the purposes of this record, there are sixteen rooms in the house

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and that she (the tenant) does not occupy more than one or two rooms at any time." It was further conceded that the tenant is a widow and that "she has no other business except the letting of rooms in this house and that the letting of rooms in this house is her sole or principal means of livelihood."

It is quite evident that the words "dwelling purposes" are not capable of a fixed definition which will be always applicable regardless of the context in which they are used, and an examination of the cases in which these words have been construed shows that the courts have placed one construction on them when used in a statute defining burglary, and another construction when used in a statute intended to restrict the granting of liquor licenses in residential districts; and they have placed one construction on them when used in a restrictive covenant in a deed and another construction on them when used in a warranty or condition in an insurance policy. This case itself furnishes a most striking example of the impossibility of finding a definition of the words that will satisfy all cases, for though the landlord asks us to reverse a finding that the house is "occupied for dwelling purposes" within the meaning of the statute, he has accepted a concession in which it is expressly stated that "the house is occupied for dwelling purposes."

It is plain that if we give the words a broad signification or even the ordinary signification in which they were used by the parties at the trial, then we must hold that the trial judge correctly held that the landlord's petition must be dismissed under the express provisions of the statute; and we can give these words a narrower signification only if a narrower construction will carry out the legislative intent. The statute under consideration is a remedial and not a penal statute, but it was enacted to meet an extraor-

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dinary emergency by remedies of an extraordinary nature, and in construing the statute we are justified in assuming that the legislature never intended that its provisions should apply to cases where they could not constitute a remedy for the conditions which the legislature sought to relieve. The legislature has sought to protect the homes of inhabitants of great cities and to prevent landlords from compelling tenants to pay unreasonable rents for their homes. The legislature has not sought to protect the tenants of business premises from demands for unreasonable rent, and the landlord argues that in the present case the tenant is under the conceded facts using the premises for the business of a rooming house, and the legislature never intended that her business should receive extraordinary protection.

It is plain that the legislature did not intend its extraordinary remedies to apply to premises hired by the tenant for purposes of profit, even though that profit be made by the tenant in operating a hotel, a rooming house or a boarding house. The extraordinary laws do not prevent the lessee of such premises from securing from his guests all the compensation which he can induce or compel them to pay for housing, and it may well be argued that when the legislature used the words "occupied for dwelling purposes" it intended an occupation *by the tenant* for such purposes, and that the statute should not be construed as including premises which are occupied by the tenant for the purpose of providing dwelling or shelter to others for the tenant's profit.

For the purposes of this appeal, I have assumed that this is the correct construction of the statute, but even if so construed, it seems to me that its provisions are broad enough to protect the tenant in this case. Obviously the legislature did not intend to

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exclude from the operation of the statute premises occupied as a dwelling not only by the tenant, but also by self-supporting members of the family who pay rent or board to the head of the household, and it can hardly be contended that the legislature intended to exclude from its operation similar cases where the paying guests are not related and perhaps strangers to the tenant so long as the renting of the rooms to strangers is merely incidental to the occupation of the premises by the tenant as his dwelling. The landlord's counsel urges, however, that even if this construction be correct, in the present case it cannot reasonably be said that where fourteen or fifteen rooms in a house of sixteen rooms are leased for profit, the premises are still occupied by the tenant as her dwelling, and that in effect the house is occupied for business rather than dwelling purposes. While I recognize that the question is not free from doubt, I cannot agree with the landlord's contention. The tenant lives in the house and it constitutes her dwelling. So far as the record shows, she manages the household affairs, and the other persons who occupy most of the rooms in the house are in a sense members of the household and even of the family. There is no essential difference in the relations of the head of a household which includes one lodger who pays for his lodging and one which includes a number of lodgers. Even the term "family" is sometimes given a meaning sufficiently broad to include boarders or lodgers (see Words and Phrases Judicially Defined), and it seems to me that the legislative intent to protect tenants of premises "occupied for dwelling purposes" cannot be given its proper force and effect, unless we include within the protection of the statute all tenants who occupy the premises for the purposes of dwelling therein with their households, including

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lodgers who form parts of the household even though the household is supported in whole by the payments made by the lodgers.

Order should therefore be affirmed, with twenty-five dollars costs.

GUY and WAGNER, JJ., concur.

Order affirmed, with twenty-five dollars costs.

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ACHILLE STARACE & Co., INC., Respondent, *v.* RAPOREL S. S. LINE, INC., and EDWARD M. RAPHEL & Co., INC., Appellants.

(Supreme Court, Appellate Term, First Department, December, 1920, Term — filed January, 1921.)

**Ships and shipping — contracts — terms of — evidence — rates — trial.**

The only issue litigated in an action for the non-delivery of three cases of goods delivered by plaintiffs to defendant at the city of New York for shipment to a foreign port, was whether defendant's liability was limited to $100 for each case lost, and though the evidence showed that defendant had two rates, one of which was *ad valorem*, the trial justice, in spite of a clause in the bill of lading issued at the time the goods were delivered to defendant, which provided that "unless a higher value be stated herein, the value of the goods does not exceed $100 per package, nor $8 per cubic foot, and the freight thereon has been adjusted upon such valuation, and no oral declaration or agreement shall be evidence of a different valuation," gave judgment in favor of plaintiff in the sum of $688, the actual value of the goods which had been lost. *Held*, that said clause was of itself a statement that the rates were based upon a valuation of $100 and constituted a notice that if the shipper desired to place a higher valuation on the goods shipped, he must pay a higher rate.

The contract in terms showing the existence of an *ad valorem* rate, the plaintiff, which had been in the export business for

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several years, would have had notice of essential choice of rates had it read the contract or acquainted itself with its terms, and the judgment in its favor will be reduced to $288 and, as so modified, affirmed.

APPEAL by the defendants from a judgment of the Municipal Court of the city of New York, borough of Manhattan, first district, rendered in favor of the plaintiff, for the sum of $783.

James A. Hatch, for appellants.

David Bernstein, for respondent.

LEHMAN, J. The plaintiff delivered to the defendants three cases of goods for shipment from this city to Port-au-Prince, in the republic of Haiti. The goods were never delivered to the consignee, and the defendants admit liability for their loss. At the trial it was stipulated that the only issue to be litigated is "whether or not defendants' liability in this action is to be limited to the sum of $100 for each package or case lost."

When the goods were delivered to the defendants they issued a bill of lading, and amongst the conditions printed upon the bill of lading is the following: "21. Unless a higher value be stated herein, the value of the goods does not exceed $100 per package, nor $8 per cubic foot, and the freight thereon has been adjusted upon such valuation, and no oral declaration or agreement shall be evidence of a different valuation." In spite of this clause in the bill of lading, the trial justice has given judgment in favor of the plaintiff in the sum of $688, which represents the actual value of the goods which had been lost.

In the case of *Mariani Bros., Inc.*, v. *Wilson, Sons & Co., Ltd.*, 188 App. Div. 617, the court reiterated the well-settled rule "that a carrier may limit its

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liability for damages occasioned by its own negligence by a contract fairly made with the shipper agreeing on a valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation." In that case, however, the court pointed out that such contracts limiting the liability of the carrier are valid only where "the rate of freight is based on the condition that the carrier assumes the liability only to the extent of the agreed valuation," and that, therefore, "the 'essential choice of rates' must be made to appear before a carrier can successfully claim the benefit of such a limitation and relief from full liability," and the trial justice has apparently held that this "essential choice of rates" was not shown in the present case.

The evidence does show that the defendants did have two rates, and that one of the rates was an *ad valorem* rate, but there is no evidence that defendants filed any tariff showing such rate with the interstate commerce commission, or that it was expressly offered to the plaintiff's agent who had charge of this shipment, and this agent denies that he knew of the existence of this rate or of the clause in the contract limiting the carrier's liability. The shipment by the plaintiff was not an interstate shipment, and the defendants were, therefore, not required to file any tariff with the interstate commerce commission. The clause limiting the liability itself constitutes a statement that the rates were based upon a valuation of $100 and constitutes a notice that if the shipper desired to place a higher valuation on the goods shipped, he must pay a higher rate. In the case of *Mariani Bros., Inc.*, v. *Wilson, Sons & Co., Ltd., supra*, the court stated in regard to a similar clause: "The burden was upon the plaintiff to show that there was no alternative

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in existence or that he was refused an alternative rate by the carrier. He was informed that there was such a rate by the terms of the bill of lading and it was clearly stated that unless he shipped under such rate the liability would be limited. In the absence of evidence to the contrary the presumption is in favor of the statement made in the bill of lading." The plaintiff admits that this statement of the law is binding upon this court, but claims that it has overcome this presumption by its affirmative proof that it did not know of the existence of this clause in the contract or of the existence of any *ad valorem* rate. If the plaintiff had notice of the existence of an *ad valorem* rate the benefit of which he could secure upon request, then plainly the defendants were not required expressly to offer such rate to the plaintiff. Since the terms of the contract itself show the existence of such a rate, the plaintiff would have had notice of "essential choice of rates" if it had read the contract. The plaintiff had been in the export business for several years. It undoubtedly knew that the bill of lading delivered by the defendants contained various covenants and conditions which were intended to constitute the terms upon which the shipment was delivered and received, and the defendants cannot be deprived of the benefit of any such terms merely because the plaintiff did not choose to read their contract or acquaint itself with its terms.

The judgment in plaintiff's favor should, therefore, be reduced to the sum of $288, with appropriate costs in the court below, and as modified affirmed, with twenty-five dollars costs to the appellants.

GUY and WAGNER, JJ., concur.

Judgment modified and as modified affirmed, with twenty-five dollars costs to appellants.

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JOHN TAPLINGER & Co., Respondent, v. MONTGOMERY WARD & Co., Appellant.

(Supreme Court, Appellate Term, First Department, December, 1920, Term — filed January, 1921.)

**Corporations — service of process on foreign — General Corporation Law, § 16 — when affidavit of service of summons and complaint insufficient — vacating judgment taken by default on such an affidavit.**

The statute (General Corporation Law, § 16) requires a foreign corporation doing business in this state to make and file in the office of the secretary of state a designation of the person upon whom service of process against the corporation may be made in this state.

Where with due diligence the plaintiff in an action against such a corporation, which has complied with section 16 of the General Corporation Law, could have ascertained the name of the person designated for the purpose required by the statute, and the affidavit upon which a default judgment was granted, states that service of the summons and complaint was made on the managing agent of the defendant within this state, an order denying a motion to vacate and set aside the judgment, on the ground that the papers were not properly served, will be reversed, with costs, and the motion granted, with costs.

APPEAL by the defendant from an order of the Municipal Court of the city of New York, borough of Manhattan, first district, denying a motion to vacate the service of the summons and the judgment entered by default on such service.

Arthur L. Fullman, for appellant.

Ludwig M. Wilson, for respondent.

LEHMAN, J. The plaintiff has obtained a judgment by default against the defendant. After the judgment

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was entered the defendant appeared specially and moved to vacate and set aside the judgment on the ground that the summons and complaint were never properly served upon the defendant. The original affidavit of service upon which the judgment was granted stated that service was made on the managing agent of the corporation within this state. Obviously this affidavit is insufficient, because service upon a foreign corporation can be made on its managing agent within this state only where no designation has been made, as provided in section 16 of the General Corporation Law, or if neither the person designated nor an officer specified in subdivision 1 of section 432 of the Code of Civil Procedure can be found with due diligence. After this motion was made the plaintiff filed an additional affidavit, but this affidavit, even if properly received after entry of judgment, is insufficient to cure the defect. It appears undisputed that a designation was made by the defendant, as provided in section 16 of the General Corporation Law, and the plaintiff, therefore, could not serve the summons and complaint upon the defendant's managing agent unless the person so designated could not with due diligence be found within this state. The plaintiff made no attempt to find out whether such designation had been filed, and did not know the name or address of the person designated, and of course made no effort to find this person. The process server merely took the summons and complaint to the defendant's office in this state, inquired there for the proper person upon whom to serve the papers in the action, and was informed by defendant's manager that he was the proper person. Neither the managing agent nor any other person in defendant's employ had any apparent authority to state that he was the person to accept service of processes, or to give any directions as to

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the proper person upon whom process was to be served. The defendant was required under the law to file in the office of the secretary of state a designation of the person upon whom process could be served, and no other person could assume to act in place of the person so designated. With due diligence the plaintiff could have found out the name of that person, and there is not a scintilla of evidence to sustain a finding that the plaintiff could not have found him at his office in the defendant's place of business, or that he would have evaded service.

Order, therefore, reversed, with ten dollars costs, and motion to vacate the service of the summons and the judgment entered thereon is granted, with ten dollars costs.

GUY and WAGNER, JJ., concur.

Order reversed, with ten dollars costs, and motion granted, with ten dollars costs.

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CHARLES POTTER and Another, Appellants, *v.* KURLANDER BROS. & HARFIELD CLOAK AND SUIT COMPANY, Respondent.

(Supreme Court, Appellate Term, First Department, December, 1920, Term — filed January, 1921.)

**Accord and satisfaction — what not — written order for goods — parol evidence of unwritten acceptance.**

Upon the trial of an action to recover the unpaid balance of the agreed price of goods to be manufactured, sold and delivered, evidence was given in support of the allegations of the complaint. During the cross-examination of defendant there was received in evidence an agreement to compromise the dispute between the parties which had been pleaded in the answer as a defense and bar. The plaintiffs then rested

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their case and a motion by defendant to dismiss the complaint on the sole ground that said agreement established an accord and satisfaction and was therefore a bar to the action, was granted. *Held*, that plaintiff, having made out a *prima facie* case, it was error to dismiss the complaint as manifestly the agreement was merely an accord and not an accord and satisfaction. (P. 120.)

The agent of plaintiffs testified that as the result of conversations defendant's treasurer gave him written orders which stated fully the style of goods, the price and a time within which delivery was to be made and also the terms of payment When the witness was asked whether, at the time he received the order, anything was said by him to defendant's treasurer with reference to the time of delivery, the court excluded the testimony on sustaining the objection of defendant's counsel that oral evidence was being offered to vary a written instrument. *Held*, that in the absence of evidence in writing of plaintiff's acceptance of the order, the exclusion of the testimony was error.

APPEAL by plaintiffs from a judgment of the City Court of the city of New York, dismissing the complaint at the close of the plaintiffs' case, after a trial by the court and a jury.

Joseph Gans (C. Arthur Jensen, of counsel), for appellants.

Louis Sachs, for respondent.

WAGNER, J. This action was brought by plaintiffs to recover the agreed price of certain merchandise which they claim was delivered to the defendant at its request and not paid for. The defendant in its answer denies the sale and delivery, and as a separate defense alleges that an agreement was made between the parties which provided as follows: the defendant was to recall certain merchandise which it had refused to accept from plaintiffs, and which was at the time of the making of the agreement in the possession of an express company, and was to pay all bills it then

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owed plaintiff, they agreeing to allow defendant a reduction of fifty dollars on the moneys due. That after the execution of this agreement " the defendant recalled the two packages specified in the agreement, but that only one package containing ten suits was received by the defendant from the express company." That defendant then communicated this fact to plaintiffs demanding that they deliver the remaining package containing seventeen suits, which the defendant was to have returned to it under the agreement. That the plaintiffs failed to make any further delivery, and that thereafter the defendant tendered a sum it claimed was due for the ten suits delivered, less an overpayment it claimed it had previously made, and that plaintiffs refused to accept the same. Then follows an allegation that the defendant has always been ready, willing and able to carry out the terms of the agreement, " but that the plaintiffs have failed and refused, and still fail and refuse, to carry out any and all parts of said agreement," and demands judgment that the complaint be dismissed.

Upon the trial the plaintiffs presented evidence to prove the allegation of their complaint, namely, that certain goods were ordered in writing of them by defendant, that deliveries were made pursuant to such orders, that there was due to plaintiffs a balance of $315.

During his cross-examination, the defendant's counsel put in evidence as an exhibit in its behalf the agreement to compromise the dispute which the defendant had alleged in its answer as a defense and a bar. The plaintiffs then rested their case, whereupon defendant moved to dismiss the complaint upon the sole ground that the agreement alleged in the answer and in evidence established an accord and satisfaction between the parties, and, therefore, was a bar

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to plaintiff's action. The court granted the motion, and plaintiffs now appeal from the judgment entered upon the dismissal of their complaint.

It was error to dismiss the complaint. The plaintiffs had established a *prima facie* case for money due for the merchandise delivered under an agreement between the parties. It is apparent, as disclosed by the agreement attempted to be set up as an accord and satisfaction and from the cross-examination of plaintiffs' witness, that there was a controversy on the question of timely deliveries. The defendant undoubtedly attempted to return some of the merchandise in question, because it claimed deliveries were not made within the time specified in the orders given by it. Whether there were untimely deliveries and whether those untimely deliveries constituted a material breach of the contract of sale, were questions of fact. However, failure to prove full performance by plaintiffs was not the ground of the dismissal of their complaint. The agreement set up in defendant's answer as a defense to plaintiffs' cause of action, is not, as the answer itself makes manifest, an accord and satisfaction, and therefore is not a bar to plaintiffs' cause of action. It is merely an accord. "An accord," says Sir William Blackstone, "is a satisfaction agreed upon between the party injuring and the party injured, which, when performed is a bar to all actions." 3 Black. Comm. 15. "An accord executory without performance accepted is no bar; and tender of performance is insufficient." *Kromer* v. *Heim*, 75 N. Y. 574. In the case at bar the accord was never satisfied, and thus it is no bar to the plaintiffs' cause of action.

During the trial the court erroneously excluded evidence offered by plaintiffs. Plaintiffs' agent testified that as a result of certain previous conversations, the defendant's treasurer gave him written orders for

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the merchandise in question. The orders stated fully the style of goods to be manufactured, the price and a time within which deliveries were to be made, and also the terms of payment. There was no written acceptance of the orders by plaintiffs. The witness was asked by plaintiffs' counsel whether anything was said by him to the defendant's officer who had handed him the order, with reference to the time of delivery provided for in the said order. The question was objected to by defendant's counsel as were other questions along the same line, upon the ground that oral evidence was being offered to vary a written instrument, and the court sustained the objection and excluded the testimony. Since there was no written evidence of acceptance by the plaintiffs of the order, oral proof was permissible to show upon what changed terms, if any, the plaintiffs accepted. We allude to this error since there must be a new trial of the action.

GUY and LEHMAN, JJ., concur.

Judgment reversed and new trial granted, with costs to appellant to abide event.

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ELEONORE K. KLINGENBECK and Another, Landlords, Appellants, *v.* EDWARD WARREN YOUNG, Tenant, Respondent.

(Supreme Court, Appellate Term, First Department, December, 1920, Term — filed January, 1921.)

**Landlord and tenant — summary proceedings — objectionable tenant — when dismissal of petition is error — no appeal unless a final order is entered.**

Upon the trial of a summary proceeding instituted October 6, 1920, against a holdover tenant of an apartment, alleged to be objectionable, the landlord produced as witnesses several

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occupants of apartments in the same and adjoining house, who testified to conduct on the part of defendant sufficient to sustain the specifications in the petition of the alleged objectionable nature of his occupancy, but none of them could testify, as alleged in the petition, that any refuse was thrown from the windows of the tenant's apartment or that any piano therein was unreasonably used after June, 1920. *Held*, that the dismissal of the petition upon the ground that under the statute (Laws of 1920, chap. 942) the proceeding could be maintained only if the tenant was doing objectionable things at the time the proceeding was instituted, was error, for the reason that the trial judge had no right to take the case from the jury because of the absence of evidence that the objectionable acts had continued over the summer.

Where no final order has been entered in a summary proceeding, an appeal from a dismissal of the landlord's petition must be dismissed.

APPEAL from a judgment of the Municipal Court of the city of New York, borough of Manhattan, seventh district, dismissing the petition of the landlords to recover possession of a certain apartment.

Brussel & Beebe (E. Walter Beebe, of counsel), for appellant.

Edwards, O'Loughlin & George (David G. George, of counsel), for respondent.

*Per Curiam.* On the 6th day of October, 1920, the landlords brought a summary proceeding against the tenant, alleging that the tenant holds over and occupies premises after the expiration of his term, and that the tenant so holding over is objectionable, that he has caused and permitted to be thrown from the window of his apartment during his occupancy dirt and refuse taken from the said apartment, and that in addition the tenant has caused or permitted the use of a piano in such a way " by long hours of continuous

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drumming and playing to annoy and become a nuisance to the other tenants occupying other parts of the building in which the demised premises are located." At the trial the landlords produced as witnesses several occupants of apartments in the same and the adjoining house who testified to conduct on the part of the defendant sufficient to sustain the specifications in the petition of the alleged objectionable nature of the tenant's occupancy, but none of the witnesses could testify that any refuse was thrown from the windows of tenant's apartment or that any piano in that apartment was unreasonably used after the month of June, 1920. The trial judge thereupon dismissed the landlords' petition, stating that under chapter 942 of the Laws of 1920 the landlord can maintain summary proceedings against a tenant who is holding over only "if this tenant is doing things that are objectionable at the time of the commencement of the proceedings." We have no doubt that the interpretation of the statute of the trial justice is too narrow. The statute requires the landlord to establish "that the person holding over is objectionable," but that fact may naturally be established by evidence of conduct at some previous time. Subsequent discontinuance of the objectionable acts and remoteness of the time when they were performed are undoubtedly factors to be considered by the jury in regard to the weight to be given to the testimony, but the trial judge had no right to withdraw the case from the jury merely because there was no evidence that the objectionable acts had continued over the summer.

The record shows that the trial judge granted the tenant's motion to dismiss the petition, but no appeal lies from a dismissal of the petition until a final order has been entered thereon. The record in this case does not show that any final order was ever entered. The

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paper in the record denominated "judgment or verdict" has none of the characteristics of a final order or judgment, and must be regarded as a mere nullity. The appeal must, therefore, be dismissed without costs to either party.

Present: GUY, LEHMAN and WAGNER, JJ.

Appeal dismissed, without costs to either party.

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PEOPLE ex rel. BUFFALO CONSISTORY, etc., Relator, *v.* JOHN C. BETZ et al., Assessors, etc., Respondents.

(Supreme Court, Erie Special Term, January, 1921.)

**Tax Law, § 4(7) — real estate of fraternal corporation, if leased, not exempt from taxation.**

Power to lease given by the by-laws of a fraternal corporation is not equivalent to a declared purpose to lease set forth in its incorporation papers, and where such a corporation, having leased its real estate to other fraternal bodies at an annual rental, fails to establish that it was created for that purpose, the real estate is not exempt from taxation under section 4(7) of the Tax Law.

MOTION to confirm report of referee in certiorari proceedings to obtain exemption from taxation of relator's real estate.

George J. Feldman, for motion.

George L. Pomeroy, opposed.

BROWN, J. The relator seeks exemption from taxation of the southerly parcel of its real estate, upon the ground that it is a fraternal corporation created to maintain its cathedral building for its meetings

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and for the accommodation of other fraternal bodies or associations, the entire net income of which is exclusively applied or to be used to maintain the Masonic Home at Utica, under the provisions of section 4, subdivision 7, of the Tax Law. The cathedral building is used by the relator for two purposes: For its meetings and for the meetings of other associations. For the occupation of this building by the other associations an annual rental is charged. The purpose of the use of this real estate by the relator for its meetings seems to be established and declared in the certificate of the incorporation of the relator in 1902. In 1905 the relator surrendered its charter of 1902 and elected to become incorporated under the provisions of the Benevolent Orders Law. Nothing seems to have been done to carry such election into execution, save to file such election with the secretary of state. It is very doubtful whether there can be found in the record submitted a stated purpose set forth in the relator's incorporation papers that the cathedral is maintained for its meetings. Assuming, however, that such purpose existed, it is believed that it can not be established from the record that the use of relator's property by other associations is based upon an existing, stated purpose set forth in its incorporation charter. It seems to be the law that if the relator's real estate be rented to other associations, the purpose of such leasing must be set forth in the relator's charter, or exemption will be denied it. *People ex rel. Mizpah Lodge* v. *Burke,* 228 N. Y. 245.

In July, 1915, the relator's by-laws were adopted providing that its real estate " shall not be rented or let to any person, corporation, association or body, except to other fraternal corporations, associations or bodies." This by-law is permissive only. Under it the relator's trustees have undoubted power to lease

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relator's real estate to other fraternal bodies. They have that power under the Benevolent Orders Law. Power to lease is not equivalent to a declared purpose to lease, made evident at relator's creation. *People ex rel. Mizpah Lodge* v. *Burke, supra.* The quoted by-law is not a statement that the relator's real estate is maintained for the accommodation of other fraternal bodies. The plain reading of the by-law is to the effect that if the real estate be rented it shall be rented only to other fraternal bodies. Does the granting of the restricted power to lease only to other fraternal bodies comply with the statutory requirement that the relator must have been created to maintain its building for the accommodation of other fraternal bodies, if it leases to others? In view of the strict interpretation by the Court of Appeals in *People ex rel. Mizpah Lodge* v. *Burke, supra,* of the statute under consideration, the holding must be that the relator has not established that it was created for the purpose of leasing its real estate. In that case it was held that the creation of the fraternal association for the purpose of affording accommodation to other fraternal bodies could not be inferred from the existence of power to lease its real estate for the accommodation of other fraternal bodies. The relator, having leased its real estate and not having established that it was created for that purpose, is not entitled to the benefit of the statute. Motion to confirm will be granted.

Motion granted.

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## NATIONAL PARK BANK OF NEW YORK, Plaintiff, *v.* OLD COLONY TRUST COMPANY, Defendant.

(Supreme Court, New York Special Term, January, 1921.)

**Banks and banking — negotiable instruments — when temporary injunction granted by court of sister state has no extra-territorial effect.**

Defendant, a Massachusetts corporation, by a letter of credit issued by it agreed with the drawers and indorsers and *bona fide* holders of drafts drawn thereunder and in compliance therewith that such drafts would be duly honored upon due presentment if accompanied by the documents mentioned in the letter of credit. In an action upon a draft drawn under the letter of credit and delivered to plaintiff, a resident of the State of New York, for a valuable consideration, it was uncontroverted that no part of plaintiff's duties in respect of any contractual relation arising from an assignment of the credit, assented to by defendant in writing, and negotiations of the draft, remained unperformed. *Held*, that an injunction *pendente lite* purporting to have been granted by the Superior Court of Massachusetts, restraining defendant from making payment under the credit had no extra-territorial force or effect in the courts of the State of New York, and was no defense to the action, it appearing affirmatively from the answer of defendant, that the plaintiff herein was not a party to that action, and plaintiff's motion for judgment on the pleadings, will be granted.

The defense sought to be established gave no ground under the true rule of judicial comity warranting recognition in our courts, since the result would be to utterly defeat the acknowledged rights of the plaintiff and deny it its day in court, and be entirely contrary to the judicial decisions in this state, that a letter of credit is a complete and independent contract.

MOTION for judgment on the pleadings.

Louis F. Doyle, for plaintiff.

Breed, Abbott & Morgan (Eugene W. Leake, of counsel), for defendant.

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McAVOY, J. The plaintiff is a domestic banking corporation organized under the laws of the United States, and has its principal place of business in New York county, state of New York, and the defendant is a Massachusetts corporation having its principal place of business in Boston, commonwealth of Massachusetts. In May the defendant issued a letter of credit to one Eugen Boissevain & Co., Inc., of New York, whereby it authorized Boissevain & Co. to draw a sight draft not exceeding the aggregate amount of $221,200 on the National Bank of Commerce, New York, covering shipments of sugar. The defendant agreed in the letter of credit "with the drawers and indorsers and *bona fide* holders of draft drawn under and in compliance with this letter of credit that the same shall be duly honored upon presentation at the office of National Bank of Commerce, in New York City, if accompanied by the documents that were therein mentioned." Subsequently, the defendant assented in writing to the assignment of this credit to the plaintiff, the National Park Bank. In October, 1920, a draft was drawn by Boissevain & Co. under this credit of $220,442.19 on the National Bank of Commerce, New York, payable to the plaintiff, and this draft was delivered to the plaintiff for a valuable consideration, plaintiff having all of the essentials of a *bona fide* holder of a draft as a negotiable instrument. The draft conformed fully with the letter of credit, had attached all of the documents required by the letter of credit, and the documents fully conformed with the provisions of the credit. The plaintiff, in parting with the considerations which it had paid for the draft, acted in reliance on defendant's promise contained in the letter of credit. When the draft and documents were presented to the National Bank of Commerce, all due forms being observed, on October 27, 1920, and

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later when presented to the defendant itself, the Old Colony Trust Company, of Boston, on October twenty-ninth last, the draft was not paid. It is uncontroverted that no part of the plaintiff's duties in respect of any of the contractual relations, which arise from the assignment of the credit and negotiations of the draft, remain unperformed. The alleged complete defense to the action is an injunction purporting to have been issued by the Superior Court of Massachusetts restraining the defendant from making payment under the credit. The precise language of the injunction of the Massachusetts court is that this defendant (Old Colony Trust Company) is enjoined and restrained "from accepting or otherwise recognizing the validity of any draft drawn under or pursuant to said letter of credit dated May 15, 1920, by Eugen Boissevain & Co., Inc., or by any other person, firm or corporation whatsoever, as assignee or holder thereof." This state of the pleadings gives plaintiff the right to judgment for the amount of the defaulted draft, unless the plea of the continuance in force of this injunction is a complete defense to plaintiff's action. There is no doubt that the injunction, of itself, as a mandate of a foreign court has no force or effect extraterritorially in the courts of this state under the full faith and credit clause of the Federal Constitution. It appears affirmatively from the answer that this plaintiff was not a party to the action in Massachusetts, and that the sole parties were one E. R. Sherburne & Company, plaintiff, the Old Colony Trust Company and Eugen Boissevain & Co., Inc., defendants. Even where effect is given to judgments and decrees of the courts of sister states, it is a basic principle that the court which gave the judgment or decree must have jurisdiction of the parties upon whose rights it is adjudicating or pretending to adjudge. The Massachusetts court never



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obtained or had jurisdiction of either the plaintiff's person or its property, and had no power to adjudicate in respect to its rights under the draft and assignment of credit herein so as to bind the plaintiff by its adjudication. *Pennoyer* v. *Neff*, 95 U. S. 714; *Haddock* v. *Haddock*, 201 id. 562. The Federal Constitution's provision that full faith and credit shall be given in each state to judicial proceedings of other states is not a ground upon which the courts in which the judgment of the sister state may be presented may be precluded from inquiring into the jurisdiction of the court which renders the judgment over the subject matter of the suit or the parties affected by it, or into the facts necessary to give the original court jurisdiction. *Pennoyer* v. *Neff*, *supra*. Defendant recognizes that lack of jurisdiction of the Massachusetts court over the plaintiff here must inhibit a claim that the Massachusetts injunction should be recognized in New York on account of the full faith and credit clause of the National Constitution, and in addition is aware that since the injunction is a temporary one and may not be made final until after the trial in Massachusetts it is not such a judgment as would, in any event, be recognized by the courts of this state, because it is not a definitive judgment on the merits. The rule is of common knowledge that the definitive judgment of a court of another state between the same parties on the same cause of action on the merits of the case is conclusive, but it must be a definitive judgment on the merits only. Where the judgment is merely interlocutory the determination of the question by the court which rendered it did not settle and adjudge finally the rights of the parties. It is based upon a special application pending the suit which by our practice might, on leave had, be renewed on new state of facts presented. *Walsh* v. *Durkin*, 12 Johns. 99. It seems

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to be anomalous to give a decision upon an interlocutory motion or application in another state as full a degree of faith and credit, or to regard the same as possessing equal dignity of conclusiveness, as would be given to a final adjudication between the parties over all of whom the court had full jurisdiction in a decision of the main controversy between them in this state. The principle that the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect, commonly called judicial comity, is not transgressed by ruling adversely to the claim here made. The rule of comity is based on the theory that a court which first asserted jurisdiction will not be interfered with in the continuance of its assertion by another court of foreign jurisdiction until it is convenient and desirable that the one give way to the other. *Mast, Foos & Co.* v. *Stover*, 177 U. S. 485. Comity is not a rule of law, but one of practice, convenience and expediency. It is something more than mere courtesy, and implies only deference to the opinions of others, since it is of substantial value in securing uniformity of decision and discouraging repeated litigation of the same question. Its obligation, however, is not imperative. If this were so, the indiscreet action of one court might become a precedent made more weighty by each successive adjudication, until the whole country was tied down to an unsound principle. Comity persuades, but it does not command. It demands that no one should abdicate his individual judgment, but only that deference shall be paid to the judgment of other coordinate tribunals (words taken from the text case, *supra*). The defense here sought to be established, as appears from the plea respecting the action of the Massachusetts court, gives no ground under the true rule of comity warranting recognition

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in our courts, since the result will be to utterly defeat the acknowledged rights of the plaintiff, a resident of this state, and deny the plaintiff its day in court, and be entirely contrary to rulings in this state holding that a letter of credit is a complete and independent contract. *Frey & Son, Inc.*, v. *Sherburne Co.*, 193 App. Div. 849. Nothing is shown which would indicate any privity of contract between the plaintiff here and the Sherburne Company, which is plaintiff in the Massachusetts action, and no indication is given of any valid ground upon which the defendant may be restrained at the instance of the Sherburne Company from paying its obligation to the plaintiff. Whatever rights Sherburne & Company may have in the premises must be founded upon the contract made for the sugar, or under some other contract, for there was nowhere in the letter of credit any indication that they are concerned with that document. No prejudice accrues to them if the defendant pays under the letter of credit. They have a complete and adequate remedy at law to recover damages sustained by any breach of the contract of sale, and against the bank which issued the letter of credit for violation of any requirement of the credit. *Frey & Son, Inc.*, v. *Sherburne Co., supra.* Motion for judgment on the pleadings is granted.

Motion granted.

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THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, v. ALEXANDER BRYANT CO., MILTON SCHNAIER, MILTON SCHNAIER CONTRACTING CORPORATION, MORRIS JARCHO, JACOB JARCHO and JARCHO BROTHERS, INC., Defendants.

(Supreme Court, Extraordinary Trial Term, January, 1921.)

**General Business Law, §§ 341, 345 — witnesses testifying before legislative committee not entitled to immunity from prosecution under said statute.**

The "Lockwood committee" is not a "court, magistrate or referee" within the meaning of section 345 of the General Business Law.

Where because of testimony given by them as witnesses before the joint committee of the senate and assembly (Lockwood committee), as to their dealings with each other and with others, defendants were charged by indictment with a violation of section 341 of the General Business Law, they are not entitled to the immunity from prosecution granted by section 345 of said statute.

MOTION to dismiss indictment.

Charles L. Newton, Attorney-General (Deputy Attorney-General Kenneth M. Spence, of counsel), for People.

Milton Mayer, for defendants.

McAVOY, J. The defendants are charged with the violation of section 341 of the Business Law of the state of New York, which is known as the Donnelly Law. Defendants Schnaier and Jarcho were subpoenaed as witnesses in October last to testify in a proceeding and investigation held by the joint committee of the senate and assembly, known as the Lockwood committee. They gave certain testimony as to their dealings with each other and with others and

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claim that because of the testimony so given they are entitled to immunity from prosecution under the said Donnelly Act. The provision of section 345 of the Business Law, which constitutes the so-called immunity provision, is: "Section 345. No person excused from answering. No person shall be excused from attending and testifying, or from producing any books, papers or other documents before any court, magistrate or referee, upon any investigation, proceeding or trial, pursuant to or for the violation of any of the provisions of this article, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture, for or on account of any transaction, matter or thing, concerning which he may so testify, or produce evidence, documentary or otherwise. And no testimony so given or produced shall be received against him upon any criminal investigation, proceeding or trial." It does not seem to me that any sound argument can be made for a ruling that the so-called Lockwood committee is included in the language of section 345 of the Penal Law referring to "any court, magistrate or referee." The authority on which reliance of defendants is based is *People* v. *Sharp,* 107 N. Y. 427. The defendant in that criminal action had appeared before a legislative committee in obedience to a subpoena and had testified as a witness in the investigation or proceeding conducted by said legislative committee to investigate the alleged crime of bribery. The section then covering testimony with respect to bribery was the present section 38 of the Penal Law, then known as section 79 of the Penal Code. It provided that a person offending against any provision of the Code relating to bribery is a competent witness against another person so offending and may

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be compelled to attend and testify upon any trial, hearing, proceeding or investigation in the same manner as any other person, and that a person so testifying should not thereafter be liable to indictment, prosecution or punishment for said bribery. Sharp contended that the meaning and spirit of this statute was that the disclosures made by him before the senate committee were privileged and could not be used against him on his trial, the People claiming that section 79 of the Penal Code did not embrace an investigation by a senate committee, but was limited to such testimony only as might be given upon a trial, hearing, proceeding or investigation in the course of a criminal action; that it had no application to such testimony as might be given in the course of legislative proceedings or investigations. This claim of the People was overruled by the court, and it was held that the use of the words "upon any investigation" referred to an inquiry which the legislature had the right to make, and which, in view of the recitals in the resolution creating it, it was its duty to make, in order that the abuses which were disclosed might be cured by further action by the legislature or by the People. The court pointed out that full effect was to be given to the force and validity of every word, so that no part of the section would be annulled or rendered nugatory, and with that mode of construction it cannot be doubted that *Sharp's* case was brought literally within the language of the section 79 of the then Penal Code. Sharp was a person offending against one of the specific provisions of the Code in relation to bribery. He was accused and had been convicted of giving a bribe. He was qualified under the section as a competent witness. He was testifying against another person so offending against one of the provisions of the Code relating to bribery. He was a witness before

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the committee in relation to bribery. He was a witness against another person or body specifically accused in the resolution of the senate. He was compelled to attend and testify against another person or other party to the transaction. The testimony was given upon an investigation duly authorized, and applying the natural meaning of the words to the circumstances of that case there was no incongruity nor inconsistency in adapting them to the facts then appearing. The General Business Law, section 345 (Donnelly Act), does not include any term, idea, word or concept or permit an inference from any of such comparable to the words used in the bribery section (former Penal Code, § 79) "any investigation." This latter is a comprehensive and all-including phrase and doubtless bounds all investigations in the conduct of which persons might be called by authority as witnesses to testify under oath concerning any matter. And it would include, if taken literally, the action of a legislative committee, according to the direction given it, and acting with authority to subpoena witnesses and enforce their attendance and examine them under oath. It did not exclude every sort of hearing or investigation excepting only a judicial investigation by a regularly constituted court, and although the investigation may be only for the collection of information required for the proper performance by the legislature of its own functions, it would, nevertheless, be a proceeding requiring witnesses and power to compel their attendance. A comparison of the statute under which Sharp was held immune and section 345, *supra* (Donnelly Act), reveals the intent of the legislature not to include in its provisions any immunity of persons testifying as witnesses for testimony compelled or voluntarily given before a legislative committee conducting "any investigation."

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The tribunals before which immunity may be secured for testimony given under that act are "any court, magistrate or referee upon any investigation, proceeding or trial *pursuant to or for a violation of any of the provisions of this article* * * *." Where the words are without ambiguity and the meaning unequivocal construction is not part of the business of a court. The disparate features of this case and the *Sharp* case are outstanding and inescapable. The attendance of the defendants, who claim immunity here, before the Lockwood committee as witnesses, and who now ask a dismissal of the indictment found against them by motion because of this provision of law (§ 345) and because of the giving of testimony involving transactions, matters or things concerning which they did so testify, did not entitle them to the immunity granted under the Donnelly Act, and their motion to annul the action of the grand jury and dismiss the indictments against them and discharge them because of such alleged immunity is denied.

Motion denied.

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THE MODEL BUILDING AND LOAN ASSOCIATION OF MOTT HAVEN, by GEORGE I. SKINNER, as Superintendent of Banks of the State of New York, Plaintiff, *v.* ALFRED G. REEVES, AMBROSE G. TODD, HAROLD SWAIN, ALEXANDER ROWLAND and HERBERT REEVES, Defendants.

(Supreme Court, New York Special Term, January, 1921.)

**Partnership — liability of firm for fraud of one partner — statute of limitations — Code Civ. Pro. § 382(5).**

A firm is liable for the fraud of one partner in the course of the transactions and business of the partnership, even when

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the other partners had not the slightest connection with, knowledge of or participation in the fraud.

Where in an action against a firm with which plaintiff had an account, for the misapplication of plaintiff's money by one of the partners without the knowledge of the other partners, no claim is made that the defendants other than the guilty partner had knowledge of or participated in the fraud, the statute of limitations prescribed by section 382(5) of the Code of Civil Procedure does not apply except in so far as it relates to the claim against the guilty partner; the liability of the other partners ends with the running of the statute from the time of the actual wrong.

ACTION for fraud.

Phillips, Mahoney & Liebel (Jeremiah T. Mahoney and J. Archer Hodge, of counsel), for plaintiff.

O'Brien, Boardman, Parker & Fox (Herbert C. Smyth and Edwin W. Cady, of counsel), and Harold Swain, for defendants.

McAVOY, J. There has been a complete judicial settlement of the doctrine that the partners of a firm are liable for the frauds committed by either or any of them in the transaction and prosecution of the partnership enterprise; that the firm is bound for the fraud committed by one partner in the course of the transactions and business of the partnership, even when the other partners have not the slightest connection with, knowledge of or participation in the fraud. Story Part. 108; *Griswold* v. *Haven*, 25 N. Y. 595. The firm being liable for frauds committed by one of its members while acting for the firm and in transacting its business, the innocent partners cannot divest themselves of their responsibility on the ground that they never authorized the commission of the fraud or participated in its fruits. Lindley Part. 150. All the defendants here were partners and all, with the excep-

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tion of one, are conceded to have been entirely guiltless of any participation in the fraud perpetrated by the one. But it is impossible for them to escape from the consequences that legally flow from the relation they assumed, not even where, as in this instance, none but the guilty member had any connection with, knowledge of or participation in the fraud or its fruits. The defendants are liable because they were partners at the time of the transactions set forth in the complaint with the concededly guilty partner, whereby the plaintiff suffered loss through his fraud. The real question is, has the plaintiff lost its right to recover against the defendants for this liability through a sufficient lapse of time to cover all the transactions within any provision of law preventing the maintenance of an action through limitation? Section 410 of the Code of Civil Procedure prescribes that: "Where a right exists, but a demand is necessary to entitle a person to maintain an action, the time, within which the action must be commenced, must be computed from the time, when the right to make the demand is complete; except in one of the following cases: 1. Where the right grows out of the receipt or detention of money or property, by an agent, trustee, attorney, or other person acting in a fiduciary capacity, the time must be computed from the time, when the person, having the right to make the demand, has actual knowledge of the facts, upon which that right depends." There is no question but that this provision of the Statute of Limitations runs in favor of agents, trustees and attorneys whenever the obligation upon them is constructive but not expressed, and when both the constructive trustees or agents as well as the other party to the suit were ignorant of the facts upon which the obligation is sought to be based. The statute does not run in favor of one who himself

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is guilty of fraud and thereby has obtained property as a constructive trustee. Here there was a misapplication of the plaintiff's money; it was made by a partner of the defendants' firm without their knowledge or participation either in the fraud or the proceeds. Their liability as trustees or attorneys results not from any act of theirs or of the plaintiff's, but from the application of the doctrine of equity which regards them as standing in that relation in order to give the plaintiff a remedy. From that doctrine and principle of equity, and not from any fraud or knowledge of fraud or misapplication, a contract liability to make restoration is implied. The statute runs from the date of the wrong which raised the implication where a trustee becomes so by implication or construction. It is actual fraud against which the statute does not run until it is discovered. The statute commences to run against constructive fraud as soon as the act or omission constituting it occurs. *Price* v. *Mulford*, 107 N. Y. 303; *Finnegan* v. *McGuffog*, 139 App. Div. 899; affd., 203 N. Y. 342. Under subdivision 5, section 382, of the Code of Civil Procedure "an action to procure a judgment, other than for a sum of money on the ground of fraud in a case which on the 31st day of December, 1846, was cognizable in the Court of Chancery, must be commenced within six years, but the cause of action in such a case is not deemed to have accrued until the discovery by the plaintiff or the person under whom he claims of the facts constituting the fraud." The plaintiff here did not have any knowledge, actual notice or information as to the various defalcations and misapplications of funds belonging to it by the guilty partner defendant prior to February 1, 1917. If the conceded fraud of the defendant guilty of the actual misapplications is imputable as a matter of law to each of the defendants,

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this subdivision of section 382 would prevent the running of the Statute of Limitations until February 1, 1917, and bring all the transactions complained of within a proper time for the commencement of suit pursuant to law; but there is no claim that the defendants other than the guilty partner were actively or expressly instruments in the practice of any fraud in reference to the peculations and misappropriations committed against the plaintiff, and it would seem, therefore, that the provisions of section 382, subdivision 5, *supra,* which provide that the cause of action is not deemed to have accrued until the discovery of the facts constituting the fraud has no application to the claim made by the plaintiffs in this case, except in so far as it relates to their claim against the guilty partner. The partnership entity comprising all the partners who are owners of the partnership property holding *per my et per tout,* would if participating in the fraud, even to the extent of receiving an aliquot share of the misappropriated funds without knowledge of their fraudulent source, remain subject to the suspension of the statute until discovery by the person defrauded of the facts constituting the fraud to the full extent of the defalcation. But their liability as partners in the case of their innocence of actual wrongdoing when they are charged with knowledge which they can have only constructively and not actually and where the firm fund is not enriched at all by the peculations ends with the running of the statute from the time of the actual wrong. The action is concededly one in equity to procure a judgment on the ground of fraud. Such an action is included within this section because, although the words "other than for the sum of money" are contained in subdivision 5, it includes all cases in which equitable relief is required, although as part of the ultimate

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relief a money judgment is also demanded. Each item of the account of which misappropriation is charged must be considered as of its own date, and in no view of either of these limiting statutes is any item shown to have been sued upon within six years of the time that it accrued against the innocent defendants.

Judgment for defendants.

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CARL M. OWEN, as Successor Trustee under the Last Will and Testament of SUSAN DYCKMAN, Deceased, Plaintiff, *v.* JOHN H. BODINE, FANNIE E. HICKS, WARREN E. FRENCH, JR., and ETHEL G. H. FRENCH, His Wife, and STEPHEN E. DITCHETT, as Executor of GEORGE W. DITCHETT, Deceased, Defendants.

(Supreme Court, New York Special Term, January, 1921.)

**Foreclosure — mortgages — default — when deficiency judgment may not be entered for taxes and assessments.**

Though the defendant in an action to foreclose a mortgage who made the bond allows a default to be taken against him, no judgment for deficiency may be entered against him for taxes and assessments paid by plaintiff after the action was commenced.

*Mutual Life Ins. Co.* v. *Newell*, 78 Hun, 293, distinguished.

ACTION of foreclosure.

Frauloff & Robinson (George J. Johnstone, of counsel), for motion.

Edward S. Clinch, for defendant Fannie E. Hicks (not opposing).

TIERNEY, J. This is an action of foreclosure. The plaintiff claims that after the commencement of the

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action he paid taxes and assessments, and he asks to have the amount added to the amount of the mortgage debt as set forth in the complaint. One of the defendants made the bond, and a deficiency judgment is demanded against him. He has been served with a summons and complaint and has allowed a default to be taken as against him. His default enables the plaintiff to take judgment against him upon the claim set forth in the complaint. If that claim is to be extended by adding other items to it, no default or admission as to these items is to be assumed from the default as to the original claim. And yet the plaintiff insists that a deficiency judgment might be taken against this defendant for these items for which he never heard of a claim, on an *ex parte* affidavit of the plaintiff and bases his claim upon the case of *Mutual Life Ins. Co.* v. *Newell*, 78 Hun, 293. In that case the judgment was modified to accord with a situation that arose after the entry of judgment; the parties were all before the court, and the application was not granted on an *ex parte* affidavit, but proof was taken by the court. At least that appears from the report of the case. Certainly the courts that decided that case would not have sanctioned or approved the practice asked for by the plaintiff. The motion for a reargument is therefore granted, and upon such reargument the application is again denied.

Ordered accordingly.

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ANNE S. DODD, Plaintiff, *v.* ROBERT W. BOENIG, Defendant.

(Supreme Court, Nassau Special Term, January, 1921.)

**Title — action to quiet — tax deed — real property — Tax Law, §§ 132, 134.**

In an action to quiet title brought by the owner in possession of certain real property against the purchaser at a tax sale who never was in possession, to set aside and cancel the tax deed given to defendant by the county treasurer, it appeared that through a clerical error in the tax office a double assessment was levied against the property, one running against the owner, which was paid, and one against an unidentified person. *Held,* that the recording of the tax deed without proof of service of the notice required by section 134 of the Tax Law, which the purchaser at the tax sale did not give, was void, and that plaintiff was not barred by section 132 of the Tax Law from asserting her right to have the tax deed canceled.

ACTION to quiet title.

Philip Huntington, for plaintiff.

Edwin D. Kenyon, for defendant.

SQUIERS, J. This is an action brought by the owner in possession of certain property situated in the village of Sea Cliff, town of Oyster Bay, county of Nassau, against the purchaser at a tax sale to set aside and cancel a tax deed given by the treasurer of Nassau county to the defendant.

On the 9th day of October, 1906, the property in question was conveyed to the plaintiff by the Salvation Army. The property covered by said deed, consisting of lots 407, 408, 409, 448, 449, 1687, house and lots 450 and 451, was assessed for the year 1907

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against M. M. Dodd (who was presumably the husband of the plaintiff), and the tax levied upon such assessment was paid on July 24, 1908. It appears from the tax records offered in evidence on the trial that lot 451 for the year 1907 was also assessed against one Miss Stanley.

The property covered by the aforesaid deed to the plaintiff was also assessed for the year 1910 and the tax based on said assessment was paid. For that year also an assessment was levied against lot 451 in the name of Miss Stanley and such tax does not appear from the records to have been paid. For the year 1911 an assessment was levied against the property covered by the deed running against M. M. Dodd, which tax was paid on March 9, 1912. A similar tax was levied against M. M. Dodd for the year 1912 affecting said property, which was paid on March 4, 1913. Again lot 451 was assessed for the year 1911 running against Miss Stanley. Subsequently, as shown by the sales blotter of the town of Oyster Bay, offered in evidence on the trial, lot 451 was sold for unpaid taxes assessed against Miss Stanley, the amount of the tax being one dollar and eighty-five cents, and was purchased by the defendant for the sum of three dollars and forty cents. Subsequently there was delivered to the defendant, the purchaser on said tax sale, a tax deed dated December 20, 1910, and executed by the treasurer of Nassau county, purporting to convey lot 451, being one of the lots covered by the deed to the plaintiff heretofore referred to. At a later date lot 451 was sold for the taxes for the years 1910, 1911, 1912 and was purchased at the sale by the defendant herein on the 24th day of December, 1915, for the sum of ten dollars and eighty-eight cents. The defendant recorded his first tax deed, and it is apparent that this is the deed upon which he relies to defeat



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the plaintiff's action. After the purchase of the property by the plaintiff in 1906, she caused to be erected upon lots 450 and 451 during the winter 1906 and 1907, a dwelling house, which ever since has been and still is on the lots in question. In the month of December, 1910, the house and lots in question were rented by the plaintiff to one Franklin B. Myrick, who entered into occupancy on the 29th day of April, 1910, and remained in occupancy as tenant continuously for a period of six years. It is clear from the evidence that through a clerical error in the tax office of Nassau county a duplicate double assessment was levied against lot 451, one running against the owner and one running against Miss Stanley, who is not identified by the evidence adduced at the trial.

In spite of the able, exhaustive brief presented by the attorney for the defendant, it is unthinkable that an owner of property should be ousted from his ownership through an error made by a clerk in the tax office. The assessment attempted to be levied against the property in the name of Miss Stanley was absolutely void, and, therefore, the tax sale and all proceedings prior thereto and subsequently, were void *ab initio*. The tax which was properly levied against the owner was paid. The case of *Wallace* v. *International Paper Co.*, 53 App. Div. 41, holds that section 132 of the Tax Law refers to authorized sales and touching deeds given in pursuance thereof (at p. 43): "Such authorized deeds are made conclusive evidence of title after the lapse of a given time; but no unauthorized deed based upon an unauthorized sale, a sale where there were no unpaid taxes to warrant it, was intended to be covered by this section of the Tax Law. * * * Section 132 reads, 'every *such* conveyance,' etc. That is, conveyance on a sale for unpaid taxes."

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"A sale for two taxes when one has, in fact, been paid invalidates the sale." *Loomis* v. *Semper*, 38 Misc. Rep. 570.

In *Wallace* v. *McEchron*, 176 N. Y. 424, the Court of Appeals construed and interpreted section 132 of the Tax Law. This was an action in partition affecting certain unimproved lands in Hamilton county. One of the defendants claimed an interest in the property in question by virtue of a tax deed from the comptroller of the state of New York bearing date December 29, 1886, and subsequently recorded. The trial court found among other facts that in November, 1886, the owner applied to the comptroller of the state for a statement of the unpaid taxes upon the property, and the comptroller rendered such statement to the owner who paid the taxes. Such statement did not contain a statement of a road tax for which tax the property was subsequently sold by the comptroller. The holder of the tax title, as here, contended that the failure of the plaintiffs to bring any action within the period of time limited by section 132 of the Tax Law barred and divested all the plaintiffs' rights. At page 427 the court said:

" It has been decided by this court that where the default of the taxpayer is caused by the failure of the public officer or his clerks to render a proper statement of the unpaid taxes, a sale made for unpaid taxes omitted from the statement cannot divest the owner of his title. * * *

"The sale of the lands to Curtis and Baker was, therefore, void as against the plaintiffs, and we are thus brought to a consideration of the effect of the record of the comptroller's deed under section 132 of the Tax Law. * * *

" Such statutes have been viewed by this court both as curative acts and as statutes of limitations. It is

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to be observed, however, that none of them has been enacted in the ordinary form either of a curative act or of a statute of limitations. In terms they provide that after a certain lapse of time and in certain contingencies a comptroller's deed shall be conclusive evidence of certain facts. It, therefore, becomes necessary when any case involving the construction and effect of one of these statutes is presented to closely scrutinize and carefully analyze the statute to see whether as to such case the statute applies, and if applicable, whether its operation is that of a curative act or of a statute of limitations."

At page 429: " Where the proceedings are so fatally defective that no title passes, it cannot by a curative act transfer the title of one person to another."

A fair interpretation of the law as laid down in this case would apply equally if the act is applied as a statute of limitation. The instant case is distinguishable from the case of *Doud* v. *Huntington Hebrew Congregation,* 178 App. Div. 748. In that case the purchaser at the tax sale was in possession. In the instant case the purchaser at the tax sale was never in possession. Mr. Justice Blackmar, writing the opinion, said at page 749:

" No legislative fiat can validate the sale of the land of Emma Baker to satisfy the debt of Eunice Baker. (*People ex rel. Boenig* v. *Hegeman,* 220 N. Y. 118.)

"But although no act of the Legislature can validate the sale, it is competent for the Legislature to pass a statute limiting the time within which plaintiff may maintain an action attacking such sale. ' Such a statute will bar any right, however high the source from which it may be deduced, provided that a reasonable time is given a party to enforce his right.' (*Meigs* v. *Roberts,* 162 N. Y. 371, 378. See, also,

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*Peterson* v. *Martino*, 210 id. 412; *Bryan* v. *McGurk*, 200 id. 332; *People* v. *Ladew*, 189 id. 355.)"

A tax sale contemplates a valid and not a void assessment on which the tax in question is based. The case cited was a case of a duplication of the assessment and tax.

*Bryan* v. *McGurk*, 200 N. Y. 332, is distinguishable from the instant case as that was a case of unoccupied, wild land, whereas the case under consideration is occupied land. Quoting from the opinion of Justice Blackmar, *supra*, that: "Such a statute will bar any right * * * provided that a reasonable time is given a party to enforce his right,"—this is exactly what was not done in the case now under consideration. Section 134 of the Tax Law provides for a notice to occupants and prescribes definitely the manner of service of the notice, and the concluding sentence thereof provides, "No conveyance made in compliance of this section shall be recorded until the expiration of the time mentioned in such notice, and the evidence of the service of such notice shall be recorded with such conveyance."

It is clear from the reading of this section with section 132 that the mere recording of the deed where the property is occupied is not notice either actual or constructive to the occupant. The court finds as a matter of fact in the instant case that the property in question was occupied continuously within the meaning of that term, and that no notice such as is required by section 134 was served upon the occupant. Therefore, section 132 of the Tax Law, which the defendant relies upon as a statute of limitations in this action, does not operate as a statute of limitations in view of the fact that the occupant never had the notice provided for in section 134, and, therefore, the plaintiff is not barred from asserting her right in this action

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to cancel the tax deed. The recording of the tax deed without the proof of the service of the notice provided for in section 134 of the Tax Law is void. See *Matter of Hunter,* 189 App. Div. 805, in which Mr. Justice Jaycox says: "Owners of occupied lands cannot be deprived of their title except by strict compliance with this section. Evidence of compliance therefore is expressly required to be recorded with the conveyance and without it the record is absolutely void." *Ostrander* v. *Reis,* 206 N. Y. 448, 454, 455.

In *Clason* v. *Baldwin,* 152 N. Y. 210, the defendant asserted a title based upon a lease by the comptroller of the city of New York upon a sale for unpaid taxes. The court at page 210 said: "The proceedings were purely statutory, and the title of the owner could not be divested without a strict compliance with all the provisions of the statute. In such cases every requisite of the statute, having the semblance of benefit to the owner, must be substantially, if not strictly, complied with."

In the instant case the purchaser did not strictly comply with the provisions of the statute, in that he failed to serve the notice required by section 134 of the Tax Law, and therefore the title which he asserts must fail.

Under the General Recording Act it has been held that the recording of a deed is not notice to the owner in possession who does not claim title through any party to the deed. See *Seely* v. *Seely,* 164 App. Div. 652: "A recorded deed under the Recording Act is constructive notice to subsequent purchasers and incumbrancers. It is no notice to the owner in possession who does not claim through any party to the deed."

"The recording acts, however, do not declare what effect shall be given to the recording of conveyances,

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upon the point of notice. They declare that unless recorded, they shall be void as against subsequent purchasers in good faith, and for value, whose conveyances shall be first recorded. But the courts, by construction, make the record of a conveyance, notice to the subsequent purchasers; but this doctrine is subject to the limitation, that it is notice only, to those claiming under the same grantor, or through one who is the common source of title." *Tarbell* v. *West*, 86 N. Y. 288.

The defendant cannot, therefore, rely upon the General Recording Act in asserting his title under the tax deed.

For the reasons stated, judgment is granted plaintiff, with costs.

Judgment accordingly.

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## Matter of the Administration on the Estate of ELLEN MCOWEN, Deceased.

(Surrogate's Court, Bronx County, January, 1921.)

**Executors and administrators — when application for letters of administration granted — statutes — preference — Code Civ. Pro. §§ 2564, 2565, 2588(2).**

A surrogate has no discretion to exclude a person declared by statute to be entitled to priority of appointment as administrator, except in cases where his disqualification is declared by the statute itself.

After the death of a wife intestate, her surviving husband died leaving a will by which he gave one-third of his estate to a son, one-third to a daughter, who favored the appointment of the son as administrator of the mother's estate, one-sixth to a daughter who favored the appointment of another daughter who was given one-sixth of the estate for life, with remainder to the son. The father's will is being contested

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by the daughter who petitions for letters of administration, and the daughter who favors such appointment. *Held*, that facts alleged against the son, who opposed the appointment of his sister as administratrix, not being such as are set forth in either section 2564 or 2565 of the Code of Civil Procedure as constituting disqualification to receive letters of administration or as conditions warranting a refusal to grant them to him, his application therefor will be granted and the application of the daughter denied, as, though both had an equal right of administration, under section 2588(2) men must be preferred to women.

PROCEEDINGS for appointment of an administrator.

Francis X. Kelly, for petitioner.

Edward J. Flynn, Egan & O'Reilly, for respondents.

SCHULZ, S. On an application for letters of administration upon the estate of the decedent made by one of her daughters, a son opposes the appointment of the petitioner and asks that if administration is granted, letters issue to him. There are two other daughters of the deceased, one of whom favors the appointment of the son, and the other that of the petitioner or a trust company. Since the matter was submitted the son also has applied for his appointment as administrator and as the same facts are involved on both applications, I shall consider them together.

The right to the appointment of the administrator and the order of priority among the next of kin, is regulated by statute. Code Civ. Pro. § 2588; *Matter of D'Agostino*, 88 Misc. Rep. 371, 375. There being no surviving husband, the children of the decedent are next in order. Code Civ. Pro. § 2588, subd. 2. The section cited, however, also provides that: " If several

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persons have an equal right to administration," men *must* be preferred to women so that it would follow that the son is entitled to letters in preference to the petitioning daughter (*Matter of Curser*, 89 N. Y. 401; *Matter of Moran*, 5 Misc. Rep. 176), unless the court upon the facts alleged by the petitioner has power to deprive him thereof and direct their issuance to another.

It appears that the husband of the decedent died after his wife and left a will by which he gave one-third of his estate to a son, one-third of his estate to the daughter who favors the son's appointment, one-sixth to the daughter who favors the petitioner's appointment, and one-sixth to the petitioner for life with remainder to the son. It is claimed by the son that it was understood by the family that the decedent had no personal or real property, and for that reason no application was made for administration upon her estate.

The petitioner urges that it is purposed to bring an action to set aside an assignment of mortgage for $7,000, presumed to have been made by the decedent to her husband on the ground of fraud; that there is an unrecorded mortgage or assignment of mortgage for the sum of $6,500 in the name of the decedent which the son if appointed would not claim as the property of the estate; that the petitioner has brought a suit for the partition of real estate claimed to be owned by the decedent to which all of the children are parties and in which the son and the daughter who favors his appointment have appeared and interposed answers denying all of the material allegations of the complaint; that it is to the personal interest of the son and of the daughter referred to, to increase the estate of their father and to diminish that of the mother and that such interest of the son would clash

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with his interests as administrator which would be to increase the estate of the mother. It is apparent that the son would be personally benefited by an increase in the father's estate, assuming that the paper propounded as the father's will is admitted to probate.

The son, on the other hand, contends that if the daughter is appointed, she will, by a multiplicity of suits and entirely unnecessary litigation, cause great expense and injury to the estate.

The father's will is now being contested by the petitioner and the daughter who favors her appointment, and will be tried in February next. If it is not admitted to probate, many of the questions which are of importance now will no longer be necessary of solution. I cannot, however, take the responsibility of refusing letters of administration until that time, because matters may arise which would make immediate action by an administrator advisable.

Under the circumstances, I would deem it for the best interests of all concerned that neither the petitioner nor the son be appointed, and that letters issue to a trust company not connected in any way with either of them and which would have no interest in the controversy between them, except to see that the estate of the decedent was properly administered. Efforts to obtain the consent of the parties to such a disposition of the matter having been unsuccessful, it remains to be considered whether upon the facts stated, I have jurisdiction to decree it.

Section 2588 of the Code provides that: "Administration in case of intestacy must be granted to the persons entitled to take or share in the personal property, who are competent and will accept the same," etc. In section 2564 of the Code are enumerated the persons incompetent to receive letters of administration, etc., and in section 2565 are set forth the con-

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ditions under which the surrogate may refuse letters. The facts alleged against the son are not such as are set forth in either of these sections as constituting disqualification to receive letters, or as conditions warranting their refusal. If, therefore, I refuse to issue letters to him, it must be upon the assumption that I have some discretion in the matter.

It has been consistently held, however, that a surrogate has no discretion to exclude a person declared by the statute to be entitled to a priority, except in cases where his disqualification is declared by the statute itself (*Coope* v. *Lowerre,* 1 Barb. Ch. 45; *O'Brien* v. *Neubert,* 3 Dem. 156; *Matter of Wilson,* 92 Hun, 318; *Matter of Campbell,* 123 App. Div. 212; affd., 192 N. Y. 312), and hence I am constrained to grant the application of the son and deny the application of the daughter. Settle decision and decree on notice at which time I will hear counsel upon the question of the amount of the bond which should be required.

Decreed accordingly.

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## Matter of the Estate of JOHN C. SHULENBURG, Deceased.

(Surrogate's Court, Montgomery County, January, 1921.)

**Exemptions — when widow not estopped from claiming her statutory right — husband and wife — dower — Code Civ. Pro. § 2670.**

Where in 1889, about a year after their marriage, the wife of decedent, who died in 1920, executed a release of her dower and other rights which she had or might have in and to his property, and it appears that no children were born of the marriage; that since the execution of the contract the parties

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had lived separate and apart, and that the wife had never demanded or received any support or maintenance from him, it must be held, under section 2670 of the Code of Civil Procedure, that he died having a family, and that the wife was not estopped from claiming her statutory right to have certain property set apart to her as widow.

PROCEEDING under section 2671, Code of Civil Procedure, to compel executor to set apart property for the petitioner.

Irving Moyer (Charles D. Thomas, of counsel), for petitioner.

George C. Butler, for George Shulenburg, executor of the last will and testament of John C. Shulenburg, deceased.

SPONABLE, S. This is a proceeding instituted by the petitioner under section 2671 of the Code of Civil Procedure to compel the executor to set apart property for the petitioner as provided by section 2670 of the Code of Civil Procedure.

The petitioner was the wife and is the surviving widow of John C. Shulenburg to whom she was married at the city of Buffalo, N. Y., on the 21st day of October, 1888. John C. Shulenburg died at the town of St. Johnsville, Montgomery county, N. Y., on the 17th day of August, 1920, being at the time of his death a resident of said Montgomery county and leaving a last will and testament in which George Shulenburg was named as sole executor, which will was admitted to probate by this court on the 20th day of September, 1920, and letters testamentary thereon were issued to said George Shulenburg who qualified as such executor and entered upon the discharge of the duties of his office. An appraisal of the property

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of said deceased was made by appraisers appointed by this court and an inventory was thereafter filed, which inventory shows that deceased left personal property of the kind and character specified in section 2670 of the Code of Civil Procedure and further shows that said executor and the said appraisers failed to set apart in said inventory any property for the petitioner herein.

After the marriage and on November 25, 1889, the petitioner executed the following instrument:

"FULTON COUNTY, *ss.:*

"*Know all men by these presents* that I, Anna Shullenburg wife of John C. Shullenburg both of the Town of Stratford, County aforesaid, for and in consideration of the sum $29.50 to me paid by my husband John C. Shullenburg have granted remised and released and forever quit-claim and by these presents do grant, remise and release and forever quit-claim unto the said John C. Shullenburg his hers & assigns forever all the dower and thirds right and title of dower and thirds and all the other rights, title interest property claim and demand whatsoever in law and in equity of me the said Anna Shullenburg of in and to all the real and personal estate and property now in possession of the said John C. Shullenburg and that which he may hereafter acquire so that neither I the said Anna Shullenburg my heirs, executors administrators nor any other person or persons for me them or any of them shall have claim challenge or demand or pretend to have claim challenge or demand any dower or thirds or any other right title claim or demand or in or to the said premises and property but thereof and therefrom shall be utterly debarred and excluded forever, by these presents.

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"*In witness whereof* the said Anna Shullenburg shall hereunder set her hand and seal this 25th day of November, 1889.

"Signed, sealed and delivered in presence of CHARLES J. AUSTIN. JOHN C. SHULLENBURG.

"ANNA SHULINBURG [L. S.]

"STATE OF NEW YORK,
"COUNTY OF FULTON, } *ss.:*

"John C. Shulenburg being duly sworn deposes and says that he is one of the subscribing witnesses to the deed or conveyance hereto annexed. That deponent was present at the time of the execution of the same and saw Anna Shulenburg sign her name thereto. "JOHN C. SHULENBURG.

"Subscribed and sworn to before me this 14 day of Jan. 1897.

"FRANK E. GOULD, *Notary Public.*

"Recorded, January 14th, 1897, at 4 h P. M.

"C. H. BUTLER, *Clerk.*"

It appears that there were no children born of the marriage of petitioner and testator and that petitioner and testator have not lived or cohabited as husband and wife but have lived separate and apart and that petitioner has never demanded or received from said testator any support or maintenance since November 25, 1889, the date of the execution of the said instrument.

It is contended on the part of the executor that the petitioner is not entitled to have set apart for her as the widow of testator any of the property of which testator died possessed, as provided by section 2670 of the Code of Civil Procedure for the reason that by petitioner's signing and delivering said instrument, leaving decedent's bed and board and living separate

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and apart from him for thirty-one years and making no claim whatever against him for her support and maintenance, testator did not die leaving a family within the meaning of section 2670 of the Code and that petitioner is estopped from recovering any portion of testator's personal property and have the same set apart to her under the provisions of said section.

In accordance with the decisions in this state in construing the meaning of section 2670 of the Code based upon similar facts as those which confront me in this case, John C. Shulenburg died having a family. *Matter of Shedd,* 60 Hun, 367; *Oberndorf* v. *Farmers Loan & Trust Co.,* 71 Misc. Rep. 64.

The instrument executed by the petitioner November 25, 1889, to her husband, the testator, was an attempt on her part to release unto the testator, his heirs and assigns, all her dower and other rights which she had or might have in and to testator's property, in other words, it was a contract between husband and wife. Is it a good and valid contract and one which might be enforced by either party to it? At common law no contract made between husband and wife was enforceable. *Hendricks* v. *Isaacs,* 117 N. Y. 411.

Only so far as the inability of husband and wife to contract at common law has been abrogated by statute can they contract in this state, therefore, the legal effect of this instrument must be determined under and by the provisions of chapter 381 of the Laws of 1884, which provide:

"Section 1. A married woman may contract to the same extent, with like effect and in the same form as if unmarried, and she and her separate estate shall be liable thereon, whether such contract relates to her separate business or estate or otherwise, and in no case shall a charge upon her separate estate be necessary.

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"§ 2. This act shall not affect nor apply to any contract that shall be made between husband and wife."

The purpose of this statute was to secure to married women, free from control of her husband, the earnings and profits of her own business and her own labor and services carried on and performed on her own and separate account which at common law would have belonged to her husband. *Suau* v. *Caffe*, 122 N. Y. 308–320.

This act of the legislature gave to contracts between husband and wife no force or effect other than they had at common law and as the contract is void and of no effect under the law as it existed at the time the petitioner could not and did not release to her husband, the testator, or to his heirs or assigns, any of the claims or rights to his property that she has under section 2670 of the Code and to the exempt articles which she seeks by this proceeding to have set aside to her. *Wightman* v. *Schliefer*, 18 N. Y. Supp. 551; *Dworsky* v. *Arndtstein*, 29 App. Div. 274; *Saratoga County Bank* v. *Pruyn*, 90 N. Y. 250; *White* v. *Wager*, 25 id. 328; *Graham* v. *Van Wyck*, 14 Barb. 531; *Crain* v. *Cavana*, 36 id. 410; *Townsend* v. *Townsend*, 2 Sandf. 711; *Lawrence* v. *Lawrence*, 32 Misc. Rep. 503.

The facts in this case are rather unusual, both parties, no doubt, having entered into this contract in good faith and believing at the time that the same was valid and although petitioner and testator have lived separate and apart for a period of approximately thirty-one years yet I must conclude and decide that the petitioner is not estopped from claiming her rights under the statute as widow of the deceased.

Decreed accordingly.

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Misc.] Surrogate's Court, New York County, January, 1921.

# Matter of the Estate of LOUISA S. CANDA, Deceased.

(Surrogate's Court, New York County, January, 1921.)

**Transfer tax — what subject to — domicile — wills — statutes — power of appointment over personal property without state — Tax Law, §§ 220(6), 221(b), 230, 241.**

There is no sound reason why estates transmitted by means of powers of appointment created by will should not be governed by the same rules which control the devolution of estates by other methods. (P. 166.)

The right to take property by devise or descent is not a natural right and the sovereign power of the legislature which confers this privilege may impose conditions thereon. (P. 163.)

The state of the domicile of a decedent fixes the *situs* of his personal property for the purposes of taxation, although such property is actually without that state. (P. 164.)

A transfer of trust property effected by the exercise by decedent, who died a resident of this state, of powers of appointment created by the will of her father and grandfather, who were residents of a sister state in which the trust property is located and where her will was probated, is subject to a transfer tax under section 220(6) of the Tax Law. (Pp. 162, 163.)

Where, however, it appears that decedent by her will exercised the powers of appointment in favor of her trustees, with life estates to her children, and that the transfer to them is part of what they would have received under the wills of their ancestors if the powers had not been exercised, and said children elect to take under said wills, their life estates are not subject to a transfer tax. (P. 164.)

The will of decedent herein provided that in default of the exercise of new powers of appointment given thereby the remainder should vest in the issue of her children or in default of issue in their next of kin under the law of the state in which the trust property was located. Her executors appealed from an order assessing the tax, which included as taxable the transfers effected by the exercise of the powers of appointment, on the ground that if such transfers were taxable, the remainders should be suspended from taxation until the deter-



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mination of the question whether the donees of the new powers shall exercise them. *Held*, that section 230 of the Tax Law, as amended in 1911, and section 241 of said statute, require that the tax upon the remainders shall be presently imposed; if the new powers are exercised by the children of decedent, no tax will be due from her estate, and a refund by the state may be compelled; if, however, the appointment is not made by their wills, the state will be protected. (Pp. 165, 166.)

Appeal of the executors against a tax under section 221(b) of the Tax Law, on securities in the trust fund in the sister state, sustained, but their appeal on the refusal to deduct the federal inheritance tax denied. (P. 167.)

APPEAL from an order assessing the transfer tax.

Cadwalader, Wickersham & Taft (Francis Smyth and Edgar W. Freeman, of counsel), for executors.

Lafayette B. Gleason (Schuyler C. Carlton, of counsel), for state comptroller.

FOLEY, S. The executors appeal on several grounds from the order assessing the transfer tax. The first ground is that the appraiser has included as taxable property the transfers effected by the exercise of powers of appointment of parts of two trust estates. These powers were created by the wills of the father and grandfather of decedent, who were residents of Massachusetts. The decedent, who died April 18, 1919, was a resident of New York. The trust property is located in Massachusetts. The trustees are residents of that state, and the will of decedent was proved in Massachusetts. It is claimed by the executors that the statute is unconstitutional in its application to these transfers and that this court has no jurisdiction to assess a tax upon them. The appeal on this ground is overruled. Section 220, subdivision 6, of the Tax Law provides that as a condition of exercising a power of appointment it shall be "deemed a transfer taxable under the provisions of this chapter

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in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will." The validity of this subdivision has been upheld in *Matter of Vanderbilt,* 50 App. Div. 246; affd., 163 N. Y. 597; *Matter of Dows,* 167 id. 227; affd., *sub nom. Orr* v. *Gillman,* 183 U. S. 278; *Matter of Delano,* 176 N. Y. 486; affd., *sub nom. Chanler* v. *Kelsey,* 205 U. S. 466. My distinguished predecessor, Surrogate Fowler, in *Matter of Frazier,* N. Y. L. J., March 28, 1912, held that where the original donor was a resident of Pennsylvania and the power was exercised by the donee, a resident of the state of New York, the appointment was a transfer taxable under this subdivision. Surrogate Ketcham of Kings county in *Matter of Seaman,* N. Y. L. J., Dec. 5, 1913, held to the same effect. In that case the fund over which the power was exercised was situated in Pennsylvania and was created by the will of a resident of that state. The power was exercised by a resident of New York by a will executed in this state. In *Matter of Hull,* 111 App. Div. 322; affd., 186 N. Y. 586, the Appellate Division, second department, held in the case of a non-resident donee that liability for an inheritance tax did not depend upon the location of the property, but where the beneficiary came into possession through the exercise of a privilege conferred by the state it was within the jurisdiction and dominion of the legislature to determine the question of taxation. The right to take property by devise or descent is a creature of the law and not a natural right; the sovereign power of the legislature which confers this privilege may impose conditions upon it. *Chanler* v. *Kelsey, supra.* It is immaterial that the will here was probated in Massachusetts. It was executed in New York by a New York resident, and prop-

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erty in this state is being administered by executors named in the will. The *situs* of personal property is in the state of the domicile, although such property is actually without this state. *State of Colorado* v. *Harbeck,* 189 App. Div. 865, 872; *Bullen* v. *Wisconsin,* 240 U. S. 625; *Blackstone* v. *Miller,* 188 id. 189, 204; *Matter of James,* 144 N. Y. 6, 10; *Matter of Lydig,* 113 Misc. Rep. 263. The executors' contention cannot be sustained that the law of Massachusetts, where the trust estates are located, is applicable in this matter. *Walker* v. *Mansfield,* 221 Mass. 600, is cited by them. That case held that the exercise of the power of testamentary disposition by a resident donee appointing property located in Maryland, under a statute similar to ours, was not subject to a succession tax. The law of New York alone applies in this estate. "The power of every government over property within its jurisdiction and territorial limits extends to reasonable taxation for government support." *Matter of Majot,* 199 N. Y. 29; *Bullen* v. *State of Wisconsin,* 240 U. S. 625. Mrs. Canda was a resident of this state and her personal property wherever situated was within our jurisdiction for tax purposes. The legislature has declared the appointments made by her to be transfers of her property and they are taxable.

It appears, however, that her will exercised the powers in favor of her trustees with life estate to her children, and that the transfer to them is part of what they would have received under the wills of their ancestors if the powers had not been exercised. It is claimed that an election to take under the latter's wills had been made by the children. The appraiser therefore erred in including the value of their life estates as taxable (*Matter of Lansing,* 182 N. Y. 238; *Matter of Slosson,* 216 id. 79), and the report is remitted for the purpose of eliminating the values of

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the life estates under the Sewall and Hubbard trusts.

*Second.* The executors' second ground of appeal is that if these transfers are taxable, the remainders should be suspended from taxation until it is determined whether the donees of the new powers given in Mrs. Canda's will shall exercise them. Her will provides that in default of the exercise of the powers, the remainders shall vest in the issue of her children, or in default of issue in their next of kin under the laws of Massachusetts. The appeal on this ground is denied. The donees of the new powers reside abroad, the son of Mrs. Canda in France, and the daughter in England. There is an ample fund in the state of New York now from which to pay the transfer tax. If this property be removed from the state in the course of administration, or on final distribution, there will be no funds available for the payment of the tax in case the remainders vest under the will of this decedent. It seems to me that the provisions of section 230 and of section 241 of the Tax Law contemplated the very situation existing here, and the impounding of sufficient assets to meet this contingency as a protection to the state treasury. Under her will the estates subject to contingencies are easily ascertainable by computation, and come within rule 1 laid down in *Matter of Terry*, 218 N. Y. 218, 223. The contingencies in this estate are not mere possibilities of reverter, as in *Matter of Terry*. The probability of the vesting of the remainders in default of the exercise of the powers is not remote. *Crackanthorpe* v. *Sickles*, 156 App. Div. 753; Real Property Law, § 41. Since *Matter of Howe*, 86 App. Div. 286; affd., 176 N. Y. 570, the decisions of the Court of Appeals have progressively aided the state comptroller in securing the immediate payment of the tax upon transfers limited

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on conditions and contingencies, and have given full vigor to the legislative plan of requiring the payment of taxes at the highest rate at which they might be taxed. *Matter of Zborowski,* 213 N. Y. 109; *Matter of Parker,* 226 id. 260. In the latter case Judge Cardozo clearly sets forth this policy as follows: "The purpose is to put at once into the treasury of the state the largest sum which in any contingency the remaindermen may have to pay. The remaindermen do not suffer, for when the estate takes effect in possession, there will be a refund of any excess (Tax Law, § 230). The life tenant does not suffer, or, at all events, not seriously, for interest is paid by the comptroller upon the difference between the tax at the highest rate and the tax that would be due if the contingencies or conditions had happened at the date of the appraisal (Tax Law, § 241). If the trustees prefer, they may deposit securities of approved value, and receive the accruing income (§ 241). To guard against shrinkage of values, the statute bids them pay the balance, if the deposit turns out to be too small. Everywhere the scheme disclosed is absolute safety for the state with a minimum of hardship for the life tenant. * * * Collection is imperilled when the state must keep track of the estate through all the changes and chances of an indefinite future. The path of safety is followed when collection is made at once." The amendments of 1911 to section 230 and the additional provisions for interest or income in favor of the beneficiaries in section 241 require that the tax shall be presently imposed and not suspended. There is nothing peculiarly sacred about estates which are transmitted by means of powers, and there is no sound reason why they should not be governed by the same rules which control the devolution of estates by other methods. *Farmers Loan & Trust Co.* v. *Kip,*

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192 N. Y. 266, 278. If the powers are exercised by the children of Mrs. Canda, no tax will be due in this estate, and a refund by the state may be compelled under the law. If, however, the appointment is not made by their wills, the state will be protected. *Matter of Blun,* 176 App. Div. 189.

*Third.* The appeal of the executors on the inclusion of a tax under section 221-b of the Tax Law on the securities in the trust fund in Massachusetts is sustained. *Matter of Bowers,* 183 N. Y. Supp. 137.

*Fourth.* The appeal of the executors on the refusal of the appraiser to deduct the federal inheritance tax is denied. *Matter of Sherman,* 222 N. Y. 540; *Matter of Bierstadt,* 178 App. Div. 836.

Decreed accordingly.

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LOUIS RITTENBERG, ISAAC RITTENBERG, JOSEPH RITTENBERG and NEWMAN RITTENBERG, Composing the Firm of and Transacting Business under the Firm Name and Style of RITTENBERG BROTHERS, Plaintiffs, *v.* WILLIAM M. BARRETT, as President of the ADAMS EXPRESS COMPANY, Defendant.

(City Court of the City of New York, Special Term, January, 1921.)

**Depositions — when motion to vacate order for examination before trial denied — express companies — joint stock associations — parties — Code Civ. Pro. §§ 870, 872.**

Where the defendant in an action brought against him as president of an express company, which, by not denying in his verified answer he admits is a joint stock association of which he is the president, and the moving affidavit upon which an order for his examination before trial as president of the express company "or any other officer" of the company, clearly sets forth such facts and circumstances as show the materiality and necessity of the testimony sought, a motion to vacate the order will be denied but the order will be modified to the extent of striking out the words "or any other officer."

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The defendant, as president, and not the express company, was the "party to the action" within the meaning of sections 870 and 872 of the Code of Civil Procedure.

MOTION to vacate an order for examination before trial.

Stockton & Stockton, for motion.

Olcott, Bonynge, McManus & Ernst, in opposition.

CALLAHAN, J. This action is brought by plaintiff against "William B. Barrett, as president of the Adams Express Company." The defendant, by not denying, admits that the Adams Express Company is a joint stock corporation of which the defendant is the president. Plaintiff has secured an order for the examination before trial of "William M. Barrett, as president of the Adams Express Company, the defendant herein," or any other officer of said Adams Express Company, respecting certain matters alleged to be necessary and material for plaintiff to prove upon trial. Defendant moves to vacate this order upon several grounds, to wit: (1) That the affidavit upon which the order is based is insufficient; (2) that the order for the examination of "William M. Barrett, as president of the Adams Express Company," is unauthorized by the Code, and (3) that the direction for the examination of "any other officer" is improper. The first objection is, in my opinion, without merit, as the affidavit clearly sets forth such facts and circumstances as show the materiality and necessity of the testimony sought to be elicited. As to the second ground urged the defendant contends that "William M. Barrett, as president of Adams Express Company," is not an adverse party within the mean-

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ing of sections 870 and 872 of the Code of Civil Procedure, and, therefore, as the order is directed to him as such president and does not direct the examination of the joint stock corporation by one of its officers, the same is without authority of law and must be vacated. It is true that in cases where a corporation is party defendant the order should direct the examination of the corporation as the adverse party and then provide that the information sought be elicited by the examination of its officers (*Educational Films Corp.* v. *Lincoln & P. Co., Inc.*, 192 App. Div. 621, and cases cited), and the defendant claims that by analogy the same rule is applicable in the case of a joint stock corporation upon the theory that the association and not the officer against whom the suit is brought is the party to the action within the meaning of the Code sections above cited. In view of this contention it is incumbent upon the court to determine what is meant by the words "party to an action" as contained in section 870 of the Code, and whether in the instant case the association or the officer sued representing it is such party. In *Woods* v. *De Figaniere*, 1 Robt. 607, 610, the defendant, as in this case, was sued in his representative capacity as president of a joint stock corporation. There, also, as here, the answer was verified by him as such defendant. The court in holding that the president of the company was the party defendant, and as such might be required to submit to examination before trial, said: "What does the Code here mean by the words, 'a party to an action'? Clearly it means any and every person, who, throughout its provisions, is described as a party to an action. A party to an action is one who is named as plaintiff or defendant, and appears on the record as such, and no other is meant. The title 'parties to civil actions' prescribes who may sue as plain-

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tiffs and who may be sued as defendants. By section 134, the summons is to be served on the defendant personally, except when served on a corporation, or a minor under the age of fourteen years, or the person named in subdivision three of that section. Pleadings, when verified, must be verified by the *party*, except in the case of a corporation, or where they are verified by an agent on a sufficient excuse being shown therefor. * * * All the provisions of the Code, as a general rule, when treating of parties to the action, mean only the parties to the record, whether nominal parties, or the actual parties in interest. And when a plaintiff or defendant is but a mere nominal party, and has no interest in the event, and his property cannot be touched by the judgment, he alone is included in the description of a party to the action; and the person for whose immediate benefit the suit is prosecuted or defended is not included in the description. * * * De Figaniere is the only party defendant in this action. He is the nominal party and is so named in the statute by force of which he is sued. He is as much a party as an executor, or any other party named in section 375 of the Code. They have no actual interest in the result, and their property cannot be touched on a judgment against them, not even for the costs of the action, unless charged with them personally for mismanagement or bad faith. * * * The joint stock company is not a party to the action: it is not a legal entity, and as such cannot sue or be sued. The individual associates, as such, are not the parties. The action is defended for the immediate benefit of the joint stock company, but that is not a party, and cannot be made one. It has no capacity to sue or be sued, as such, and therefore cannot appear on the record as a party. De Figaniere is the nominal party defend-

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ant, and the only person named as a party defendant; and to claim immunity from the statute compelling a party to submit to be examined, he must show that some parties, when nominal parties only, are exempt, and that he comes within the class of exempt parties. This has not been shown. On the contrary, the Code includes all parties to the action, whether nominal or the actual parties in interest; and he is, therefore, liable to be examined the same as any other party." The reasoning in the above case is approved by the Court of Appeals in *People* v. *Mutual Gas Light Co.*, 74 N. Y. 434, 436, where it is said: "Upon the construction of a similar provision of the former Code the New York Superior Court, after an elaborate and careful examination of the question in *Woods* v. *De Figaniere*, 1 Robt. 610, arrived at the same conclusion upon reasoning which meets our approval." In *McGuffin* v. *Dinsmore*, 4 Abb. N. C. 241, the court, upholding the right of plaintiff to an order for the examination of William B. Dinsmore as president of the Adams Express Company, a joint stock corporation, before trial, said: "William B. Dinsmore is the only 'party' defendant in this action, notwithstanding that he is sued in his representative capacity as president of an association consisting of numerous individuals (*Wood* v. *De Figaniere*, 1 Robt. 607). * * * I am of opinion that neither the Adams Express Company by its officers, nor its individual members, other than such one or more of them as are or may be made parties to the record, can be examined as parties before trial, under section 870. The plaintiff was not obliged to avail himself of the privilege accorded to him by the statute of 1849, of suing the association in the name of its president. He might have proceeded at his option, in the first instance, against the persons constituting such association, by

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making them parties to the record, in which case each and all of them would have been liable to examination. * * * The association is not a corporation and cannot be examined in this suit as a party by its officers, or otherwise than through the particular individual who, by virtue of the statute and for the purposes of action represents it, as the party of record. Its officers, other than such individual, can only be examined as witnesses in the same manner as if they sustained no official relation to it." In *Brooks* v. *Dinsmore,* 15 Daly, 428, the court, on appeal, held that, pursuant to the provisions of the Consolidation Act requiring actions in the District Court to be brought in the district in which either the plaintiff or defendant resides, an action brought against a joint stock association in the name of its president must be brought in the district in which either the plaintiff or such president resides, the court holding that such president is the only party defendant. So also, in an action brought in this state by the president of a joint stock association in his own name as such president (he being a citizen of this state), it has been held that, so far as determining whether the action should be removed to the United States Circuit Court by reason of diversity of residence of the respective parties to the suit, the citizenship of plaintiff is governed by the citizenship of the person suing. *Fargo* v. *McVicker,* 55 Barb. 437. In a similar case (*Bacon* v. *Dinsmore,* 42 How. Pr. 368) the court, in granting defendant's application for a change of venue, said: "The defendant has a legal right to have the place of trial changed to New York, if the persons named as plaintiff and defendant are the parties to the action. * * * We think they are parties. The associations which they represent, clearly are not nor could they be made parties, inasmuch as they have no legal capacity to

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sue, or to be sued." I have been able to find but one case opposed to the views above expressed. *Duncan* v. *Jones,* 32 Hun, 12. This was an action against George Jones as treasurer of the association publishing the New York *Times,* a joint stock association. The action was for libel and the answer denied the material allegations of the complaint, admitting only that there is "an association publishing the New York *Times.*" The facts as to which defendant was to be examined under the order were as follows: (1) The existence of the joint stock association; (2) that it consisted of more than seven members, and (3) that the defendant is its treasurer. The court below vacated the order upon the ground that, it being an action in libel, the defendant could not be required to testify to any facts essential to sustain an indictment against him and his associates, and that the composition of such association was such a fact. Upon appeal the court questioned whether an action for libel could be brought against the treasurer under section 1919 of the Code, but left this matter for determination at Trial Term, and held that notwithstanding the fact that the action was brought pursuant to the provisions of such section, such officer is not necessarily a member of the association or partnership; that no judgment goes against him personally; that he cannot be arrested and no execution can be issued against his property or person, but that the same goes against the personal property of the association only, and for this reason such officer was not the party to the action in the technical sense required by section 870. Notwithstanding the holding in the case last above cited, I believe the prevailing rule of construction in this jurisdiction is that the officer and not the association is the party within the meaning of sections 870 and 872 of the Code, and as this construction, in my opinion, is best supported

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by reasoning, analogy and convenience, I am inclined to follow same. It is conceded that the words " or any other officer " have no place in the order, and hence the same will be modified to the extent of striking them out. Motion to vacate denied, with $10 costs, but order modified as indicated.

Ordered accordingly.

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JOHN RICCOBONO, Plaintiff, *v.* PATRICK J. CLEARY, Defendant.

(City Court of the City of New York, Special Term, January, 1921.)

**Pleading — when motion to strike out defense denied — use and occupation — statutes — tender — deposit — tenant out of possession — Laws of 1920, chap. 944, § 6.**

In an action for use and occupation the complaint alleged that prior to the commencement of the action defendants vacated the premises, and the answer, after denials of the allegations of the reasonable value of the use and occupation, pleaded as a separate defense that the occupation of the premises was under a special agreement fixing at a sum stated the rent to be paid, conceded that a certain sum was due under said agreement, and pleaded a tender thereof to plaintiff. A motion to strike out said defense was made on the ground that under the statute (Laws of 1920, chap. 944, § 6) it was improperly pleaded unless at the time of answering defendants deposited with the clerk of the court a sum equal to the amount paid as rent during the preceding month or such sum as was reserved as rent under the agreement under which possession was obtained. *Held,* that the defense raised no issue under the statute as to the reasonableness of the amount demanded in the complaint, and the motion will be denied though it was conceded that the deposit called for by the statute was not made.

It was not the legislative intent that the requirement for a deposit should be applicable except in cases where the tenant is in possession of the premises involved, at the time of the

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institution of the suit, and a motion to strike out the denials, on the same ground that the motion to strike out the separate defense was made, will be denied.

MOTION to strike out certain denials and a separate defense set up in defendant's answer.

G. Arnold Moses, for motion.

Joseph V. McKee (Charles Eno, of counsel), opposed.

CALLAHAN, J. This is a motion made by plaintiff to strike out certain denials and a separate defense set up in the defendant's answer. Plaintiff sues for the alleged reasonable value of the use and occupation by defendant of a certain house in the city of New York. It appears from the complaint that prior to the institution of this action defendant herein vacated said premises. The answer of the defendant contains denials of the allegations of the reasonable value of the use and occupation of the premises and sets up as a separate defense that the premises were occupied under a special agreement fixing at a sum stated the rent to be paid therefor. It concedes that under said agreement a certain sum is due and pleads that the defendant has tendered such sum to the plaintiff. The present motion to strike out the denials of reasonable value and the whole of the separate defense pleading the special agreement and tender is based upon the contention that under the provisions of section 6 of chapter 944 of the Laws of 1920 such denials and such defense are improperly pleaded unless at the time of answering the defendant deposit with the clerk of the court a sum equal to the amount paid as rent during the preceding month or such sum as was reserved as rent under the agreement under which possession was

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obtained. It is conceded that no such deposit was made here. The contention of the plaintiff clearly has no force with respect to the separate defense. The statute refers to denials or defenses which raise the issue of the reasonableness of the amount demanded in the complaint. The separate defense referred to raises no such issue. It sets forth that the occupation of the defendant was under a special agreement, and such agreement is properly pleaded as a bar to the action in assumpsit for rental value. The motion with respect to the denials raises a more difficult question. Upon a casual reading the statute may appear to require a deposit in every action in which a defendant raises the issue of the reasonableness of a sum claimed as rental value. A careful examination of the whole statute, however, compels me to hold that it was not intended by the legislature that the requirement for a deposit should be applicable except in cases where the defendant (tenant) is in possession of the premises involved at the time of the institution of the suit. A reading of the last sentence of section 6 of the act in question shows the intent contended for. That sentence says if judgment in the action is rendered for plaintiff and it cannot be fully satisfied from the sum deposited the plaintiff shall be entitled to a warrant dispossessing all persons from the premises in question. Consideration of the circumstances under which this legislation was adopted, the report of the committee that recommended it and a reading of the statute itself show that the intent of the legislature was to have the requirement for deposit apply only in those cases in which the tenant's continued possession of the premises without paying the landlord some rent would be unfair to the landlord. It was clearly not intended to be a statute limiting the right of a former tenant to litigate the question of the reasonableness

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of the rent demanded when the litigation of such question in no way affected the emergency which the legislature was seeking to cope with in passing the statute involved. The motion is denied.

Motion denied.

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JOSEPH E. MOLLOY, Plaintiff, *v.* JOSEPH COLETTI, Defendant.

(Supreme Court, New York Special Term, January, 1921.)

**Pleading — when demurrer to complaint overruled — restaurant keepers — injury to guest — when motion for judgment on the pleadings denied.**

Where in an action by one who while a guest in defendant's restaurant was seriously injured by being struck on the head by a heavy glass water tumbler thrown by a patron of the restaurant, the complaint alleges that defendant had notice, through the continued offensive, boisterous and unlawful conduct of the patron who threw the tumbler, a demurrer to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action will be overruled, and defendant's motion for judgment on the pleadings denied with leave to serve an answer.

MOTION for judgment on the pleadings.

R. Waldo MacKewan, for plaintiff.

Julius Halheimer, for defendant.

NEWBURGER, J. The plaintiff alleges that while a guest in the restaurant operated and owned by the defendant he was violently struck on the head by a heavy glass water tumbler thrown by a patron of said restaurant and was seriously injured. He further alleges that it was the duty of the defendant to afford protection to him from unlawful acts of other patrons,



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and that notwithstanding this duty the defendant, although duly warned by the boisterous, offensive and unlawful conduct of the patron who threw the glass, made no effort to protect plaintiff. The defendant demurs to the complaint upon the ground that the same does not state facts sufficient to constitute a cause of action. In *Rommel* v. *Schambacher,* 120 Penn. St. 579, 582, it was held: " Where one enters a saloon or tavern, opened for the entertainment of the public, the proprietor is bound to see that he is properly protected from the assaults or insults, as well of those who are in his employ, as of the drunken and vicious men whom he may choose to harbor." As the complaint alleges that the defendant had notice through the continued offensive, boisterous and unlawful conduct of the patron who injured plaintiff, the motion for judgment on the pleadings must be denied, with costs, with leave to the defendant to answer.

Motion denied, with costs.

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E. E. CHILDS COMPANY, INC., Plaintiff, *v.* P. REARDON, INC., Defendant.

(Supreme Court, New York Special Term, January, 1921.)

**Contracts — what constitutes — warehousemen — receipts — negotiable instruments — pleading — General Business Law, § 91.**

A provision in a warehouse receipt that the goods were to be stored in a particular warehouse constitutes a contract that they shall remain there and no change can be made except by consent of the holder of the receipt.

After a negotiable warehouse receipt, conforming to section 91 of the General Business Law, had been given by defendant for goods stored in one of its warehouses, it was indorsed and delivered to one to whom the goods were sold, and the buyer, upon the sale of the same to plaintiff, indorsed and delivered

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to the purchaser the warehouse receipt. Without the consent of plaintiff or any of the holders of the warehouse receipt the goods were removed to another warehouse and there destroyed by fire. In an action to recover on the warehouse receipt defendant by its answer admitted its receipt of the goods and the issuance of the warehouse receipt. *Held,* that a separate defense that defendant notified the one who stored the goods that it desired to remove them from the place described in the receipt, and that if defendant did not receive any word of objection to such course, the transfer would be made, was subject to a demurrer.

DEMURRER to defense.

Hoadly, Lauterbach & Johnson (Henry Siegrist, of counsel), for plaintiff.

Max Sheinart, for defendant.

NEWBURGER, J. The complaint alleges that the defendant, a domestic corporation, operating a warehouse, received from one Chemical Importing and Manufacturing Company sixty cases of chocolate for storage in its warehouse at Nos. 298–301 South street, and delivered to said chemical company a negotiable warehouse receipt. That thereafter said chemical company sold the said merchandise in storage to one McGoldrick and indorsed and delivered to him the said warehouse receipt. That thereafter McGoldrick sold the same merchandise to plaintiff and indorsed and delivered the said warehouse receipt to it. That thereafter the defendant notified plaintiff that the said cases of chocolate had been removed to another warehouse at No. 237 South street and there destroyed by fire. That neither the plaintiff nor any of the holders of said warehouse receipt had consented to the removal of the goods. That plaintiff presented said warehouse receipt to the defendant and demanded delivery of said merchandise and offering to pay to

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the defendant all its charges and expenses. The answer admits the receipt of the goods, the issuance of the warehouse receipt, and sets up as a separate and distinct defense that the defendant notified the chemical company that it desired to remove the merchandise from the warehouse Nos. 298–301 South street, the place described in the receipt, and that if it did not receive any word from the chemical company objecting to the said transfer that said merchandise would be transferred. That receiving no objection, defendant made the transfer. That after the transfer the goods were destroyed by fire through no fault of the defendant. The plaintiff demurs to this defense. The receipt states that it is negotiable and can be transferred by indorsement and the goods are "in store Nos. 298–301 South street." The contract is clear. Section 91 of the General Business Law provides the form of the warehouse receipt, and among other provisions it requires a statement of "location of the warehouse where the goods are stored." Section 125 provides: "A person to whom a negotiable receipt has been duly negotiated acquires thereby: (a) Such title to the goods as the person negotiating the receipt to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the depositor or person to whose order the goods were to be delivered by the terms of the receipt had or had ability to convey to a purchaser in good faith for value, and (b) The direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt as fully as if the warehouseman had contracted directly with him." The plaintiff was therefore entitled to have the contract carried out as provided in the receipt. It is clear that the provision in the receipt that the goods were to be stored in Nos. 298–301 South street constituted a

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contract that the goods were to remain there and no change could be made except by consent of the holder of the receipt. The answer fails to show any notice to or consent by the plaintiff to the transfer of the property to another warehouse. The demurrer to the separate defense must be sustained, with costs.

Demurrer sustained, with costs.

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SAVERIO GUIDA, Plaintiff, *v.* ANGELINA D'AMICE PONTRELLI, Sued as ANGELINA D'AMICE, Defendant.

(Supreme Court, Kings Special Term, January, 1921.)

**Contracts — when action cannot be maintained against third person for damages for breach of contract to marry — pleading — fraud — when motion for judgment on the pleadings granted.**

A party to a contract to marry cannot maintain an action for general damages against a parent or other person who even maliciously induces the other party to break the contract, unless fraud or other tortious means be employed.

A demurrer to a complaint which alleged *inter alia* that plaintiff incurred great expense in anticipation of his marriage to defendant's daughter and had suffered damages in the sum of $10,000 by reason of the deprivation of the companionship, society, love and affection of his fiancee, sustained with leave to serve an amended complaint and defendant's motion for judgment on the pleadings granted.

MOTION by defendant for judgment on the pleadings.

Ira G. Darrin, for defendant, in support of motion.

Edward J. Reilly, for plaintiff, in opposition.

BENEDICT, J. This is a motion by defendant for judgment on the pleadings, consisting of complaint

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and demurrer. The complaint alleges in substance that plaintiff and defendant's daughter, with defendant's consent, entered into a contract to marry; that they obtained a marriage license, defendant at the time giving her consent in writing; that afterward defendant maliciously caused her daughter to break the contract and sent her away to Italy prior to the date to which the wedding had been postponed, and that plaintiff had incurred " great expense " in anticipation of the marriage, and was deprived of the companionship, society, love and affection of his fiancee, all to his damage in the sum of $10,000, for which sum judgment is demanded. The case thus brings up the question whether an action will lie by one party to a contract to marry against a third person who induces the other party to break the engagement. Notwithstanding that this is a very unusual question, counsel on both sides have seen fit to impose on the court the labor of searching for authorities.

Before discussing the few authorities which have been found, it may be worth while to state the law applicable generally to cases of interference by a third person with the execution of a contract, through inducing one of the parties to break it. The doctrine to which our courts in New York have adhered for many years is that no action will lie in such a case, unless the breach of the contract is brought about by fraud or other tortious act. *Ashley* v. *Dixon*, 48 N. Y. 430; *Daly* v. *Cornwell*, 34 App. Div. 27; *DeJong* v. *Behrman Co.*, 148 id. 37; *Turner* v. *Fulcher*, 165 N. Y. Supp. 282. This doctrine differs from that recognized in some other jurisdictions, where it is held that an action may be maintained for maliciously inducing a party to a contract to break it, without regard to the means employed. *Automobile Ins. Co.* v. *Guaranty*

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*Securities Corporation,* 240 Fed. Repr. 222, 225; *American Malting Co.* v. *Keitel,* 209 id. 351, 358; *Wheeler-Stenzel Co.* v. *American Window Glass Co.,* 202 Mass. 471; *Booth* v. *Burgess,* 72 N. J. Eq. 181, 188; *Temperton* v. *Russell,* (1893) 1 Q. B. 715.

Coming now to cases involving the contract to marry, very few have been found. The only one in point is *Leonard* v. *Whitson,* 34 Ind. App. 383, in which it was held that an action could not be maintained against the parents of a young man, who induced him to break his engagement with plaintiff after he had seduced her, and she was with child by him, features which would seem to make the case much stronger for the plaintiff than the present action. It was also held that even if the parents had made false statements about plaintiff to induce the son to break the engagement, the action would be for slander, and the breach of the contract only an element of damage. Cooley is to the same effect. 1 Cooley Torts (3d ed.), 494, *277, *278. *Harriott* v. *Plimpton,* 166 Mass. 585, is inconclusive. *Wolf* v. *Wolf,* 194 App. Div. 33, is cited by defendant, but is of little assistance. There the parties had been married, both being under the age of legal consent, and the parents of the husband, who had not consented to the marriage, took him under their control pending an action for annulment which they had brought. In Quebec it has been held that a parent may be liable in case a minor child wrongfully breaks a contract to marry, even without active interference on the parent's part, but this doctrine seems to be based upon a law of that province making a parent liable for the torts of his minor child, the breach of promise being regarded as a tort. *Internoscia* v. *Bonelli,* 28 Queb. Super. 58; *Delage* v. *Normandeau,* 9 Queb. Q. B. 93.

Taking all these authorities I can come to no other

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conclusion than that in this state a party to a contract to marry cannot maintain an action for general damages against a parent or other person who even maliciously induces the other party to breach the contract, unless fraud or other tortious means be employed.

Plaintiff is not, however, in my opinion, remediless so far as the expenses incurred by him in anticipation of the marriage were incurred in reliance upon the defendant's consent, and before notice of the withdrawal thereof, provided such withdrawal was without adequate reason. The age of defendant's daughter is not alleged, but it is stated in defendant's memorandum that she was seventeen at the time defendant consented to the marriage; and I assume that the daughter was under eighteen at that time, because when the license was issued, defendant gave her written consent. See Dom. Rel. Law, § 15. But the complaint does not contain appropriate allegations to enable plaintiff to recover the amount of such expenses, because it does not appear that they were incurred in reliance upon defendant's consent and before notice of its withdrawal. I should regard it as also important to allege the age of the daughter, and whether or not her father was living at the time, and if living whether or not his consent could be obtained, because I think it should appear that defendant's consent was legally necessary to obtain the license, and that her consent alone was sufficient, in order to give plaintiff the right to rely thereon in making the expenditures which he alleges.

It may be urged that, as the daughter was an infant, the contract to marry was not binding upon her, and hence that no action can be maintained against the defendant for inducing the daughter to break it, even to recover the amount expended by plaintiff in

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reliance upon defendant's consent. But the fact that the contract was not binding upon the daughter does not relieve the defendant from liability in respect of these expenditures under the circumstances above mentioned, if, but for her interference, the marriage would have taken place. *Rice* v. *Manley,* 66 N. Y. 82.

The conclusion which I have reached from all the above considerations is that under the law of this state a person who, without fraud or other act amounting to a tort, induces a party to a contract to break it is not liable to the other party for general damages, but may under peculiar circumstances be liable for special damages.

The defendant's motion for judgment on the pleadings is granted, with ten dollars costs, and demurrer sustained, with leave to plaintiff to serve an amended complaint within twenty days on payment of such costs.

Ordered accordingly.

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WALTER A. WOOD MOWING AND REAPING MACHINE COMPANY, Plaintiff, *v.* THOMAS H. TOOHEY et al., Defendants.

(Supreme Court, Rensselaer Special Term, January, 1921.)

**Injunctions — when motion to vacate a temporary injunction granted — labor unions — meaning of word "picketing" — damages.**

Employees on strike may employ persuasion and peaceable means to keep non-union men from taking their places, and the fact that the employer is irreparably damaged as an incident of picketing by the strikers and that it has no adequate remedy at law does not deprive the strikers of their legal right to "picket," providing there is no malice and no violence. (P. 188.)

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A motion to vacate a temporary injunction principally against "picketing" granted in an action brought for a permanent injunction against certain workmen of the plaintiff, out on strike, granted, with admonition to defendants that any excesses or violence or depredations or destruction of property will result in another injunction, *instanter*. (P. 197.)

ACTION to obtain a permanent injunction.

George E. Greene (Alden Chester, of counsel), for plaintiff.

William A. Cahill (Alvin E. Mambert, of counsel), for defendants.

HOWARD, J. This action is brought to obtain a permanent injunction against certain working men who are out on a strike, and against other persons who are not defendants. A sweeping temporary injunction, principally against "picketing," has been obtained and this is a motion to modify or vacate it.

More than half of the complaint is devoted to a history of the strike and an attempt to establish that it was unjustified. It may have been unjustified, but that is of no importance here unless it was called to gratify malice and for the sole purpose of injuring the plaintiff's business or property. The strike was precipitated by the discharge of Toohey, one of the workmen in the plaintiff's plant. The union contends that he was unjustly discriminated against. The plaintiff denies this. If discrimination was the reason why the men went out the strike was lawful, for a labor union has a right to strike "to secure the re-employment of a member they regard as having been improperly discharged." *Nat. Pro. Assn.* v. *Cumming*, 170 N. Y. 322. Workingmen have an absolute right to strike. That is settled beyond peradventure in this state. They may state their reasons or

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not, just as they please; and their reasons, if they do state them, "may seem inadequate to others, but if it seems to be in their interest as members of an organization to refuse longer to work, it is their legal right to stop." *Nat. Pro. Assn.* v. *Cumming, supra.*

And laboring men not only have the right to strike, that is to quit work, but they have the right to persuade others to strike and to attempt to persuade others not to take their places. In order to do this the strikers must, of course, be permitted to talk to their fellow workmen and to the men who are about to take their places, otherwise there could be no persuasion; for how can one man persuade another unless he talks to him? The strikers must not, however, resort to violence or intimidation, for the non-union man has as much right to work as the union man has to strike. These are axioms. They are principles which have long been inbedded in the law.

The strikers are accused of "picketing;" in fact that is the one great grievance set forth in the complaint. But suppose they are picketing, what of that? They have as much right to picket as to strike, providing that they do not resort to threats or violence. Picketing simply means standing along the highways of approach, or near the entrances to the plant, in time of strike, for the purpose of observing who is working and of attempting to persuade them to quit. Non-union laboring men have a right to work and to go to and come from the shop unmolested, and corporations have a right to employ them, and any attempt on the part of strikers to interfere with these rights by coercion or intimidation, or by blockading the roads, or by compelling the non-union men to run the gauntlet, is unlawful; but I find nothing here which amounts to any such condition. A few sporadic instances of indiscreet language and of vulgarity are pointed out,

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but the plaintiff's affidavits show that the non-union men were in no manner frightened or cowed by this, notwithstanding that many of them claim to have been put in fear, and that in most cases they displayed a courage and defiance and employed language which fully matched the temper and talk of the strikers. It is the law of this state, so far as the question has been settled, that strikers may employ persuasion and peaceable means to keep non-union men from taking their places; and the fact that the plaintiff is irreparably damaged, as an incident of the picketing, and that it has no adequate remedy at law, does not deprive the defendants of the right to picket, providing there is no malice and no violence.

This rule, which must, I believe, at last everywhere prevail, has just recently been firmly planted in the statutes of the United States. In other words picketing has been legalized by congress. The right to picket is, therefore, no longer a debatable question in the Federal jurisdiction. The Clayton Act, so-called, enacted October 15, 1914, provides that no injunction order "shall prohibit any person or persons, whether singly or in concert, from * * * ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be for the purpose * * * of peaceably persuading any person to work or to abstain from working; * * * nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

Thus we find the right to "picket" definitely sanctioned and rooted in the statute laws of the Federal government. This enactment does not, of course, control the courts of the state of New York, in a case of this character, but it does put into Federal statutory

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form the law of this state as propounded by its ablest jurists. It also sweeps away completely, from consideration here, all that has been previously written by the Federal courts in opposition to picketing, including *Atchison, T. & S. F. Ry. Co.* v. *Gee,* 139 Fed. Repr. 582, cited by the plaintiff. And not only that, but it sets forth in bold certain statutory language, the trend of modern thought against injunctions in labor disputes. The Clayton Act has in no degree been devitalized, as between the "employer and the employees," by the decision of the Supreme Court of the United States in *Duplex Printing Press Co.* v. *Deering,* handed down January 3, 1921. That case went off on another theory.

Judge Andrews, now on the Court of Appeals, sitting then at Special Term, in a well-considered opinion, the best I have read on the subject, correctly sets forth the law of this state on picketing. He said: "Mere picketing, therefore, if it is peaceful, if there is no threat or intimidation, if it is confined to simple persuasion, I do not regard in any sense as unlawful, whatever may be the motive of the picketers." *Foster* v. *Retail Clerks' Protective Assn.,* 39 Misc. Rep. 48, 57. This is sound. It is just. It is the law. It must forever remain the law until liberty of speech ceases to be a human right.

If, then, it is the law in this state that strikers on picket duty may use "persuasion," what is persuasion? What language is permitted? What is prohibited? The nomenclature of the strike is not the language of the parlor. Men become earnest and excited and vigorous at such times. A vital principle is at stake. It is not within the limits of human nature to remain calm and gentle under such circumstances. The fervor of argument is upon them; the stimulus of battle. They forget etiquette and grammar. They

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employ strong language. Sometimes they go beyond the borders of decorum. But so do men in all walks of life. Instigated by emotion and impelled by deep conviction men always employ strong words. This happens during political campaigns, and on election day, and even in the court room while lawyers are addressing the bench. Men gesticulate, on such occasions, and become excited and demonstrative.

Must laboring men be held down to a more stringent rule? Must they be under constant restraint? Are they forced to be placid in the hour of contention? It is well, perhaps, to be so, but does the law demand it? I think not. Strikers may talk in their own language; the plain, common, strong, everyday language of the laboring man.

"A peaceable and orderly strike * * * is not a violation of law." *Nat. Pro. Assn.* v. *Cumming, supra.* The plaintiff contends, however, in addition to the alleged illegal picketing of which it complains, that this strike is not peaceable and orderly, but violent, disorderly and criminal. Let us see.

Stripped of its verbiage, generalities and conclusions, the complaint seems remarkably barren. The pleading and affidavits show that the word "scab" has been used three times, I think, and there has been some profanity and some vulgarity, and there are two or three expressions which might be construed into threats. Otherwise there is nothing, barring the allegations which in no wise appertain to the defendants, and to which I shall refer later. Not one act of violence or disorder has been traced to the door of any defendant; not an assault, not an arrest, not a shot, not a blow, not a menace.

Much importance is attached to the fact, if it be a fact, that some of the defendants on a few occasions used the word "scab." I cannot feel myself shocked

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by that word. The law, although, perhaps, deprecating its use, is not so sensitive as to be outraged by it. The word is coarse and offensive, to be sure, but it carries with it no import of infamy or crime. Its meaning is perfectly well known and its use is very common. Webster gives this definition of the word: "A working man who works for lower wages than, or under conditions contrary to, those prescribed by the trade union; also, one who takes the place of a working man on a strike." This definition embraces no thought of violence, no infraction of the law, no threat, no menace. Why should this word be especially tabooed? It is offensive, beyond question, and perhaps opprobrious. It would be better unsaid, but why should the court enjoin the strikers from using this particular word, or enjoin them from anything because they have used it? There is no reason, as I comprehend the rules of equity.

The plaintiff points out certain expressions of the defendants which it construes into threats. Such a construction is too far-fetched to warrant the court in concurring with the plaintiff. These alleged threats are so vague in character and of such insignificance, in my estimation, that I shall pass over them all, except one, without comment.

The one I have in mind is this. During the progress of the strike a barn was burned. It was owned by one of the men who had continued to work in spite of the remonstrance of the strikers. No attempt is made to show that the fire was incendiary, and not even the finger of suspicion is pointed at any striker, except that previous to the fire one of the defendants is alleged to have said to the owner of the barn, "If you go to work you will be sorry, but it will be too late." The striker vigorously denies that he ever had any such conversation with the man; but assume that he

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did, can we fairly spell out of these words a threat to burn the man's barn, or any other threat? It is nearly whimsical to attempt to import a sinister meaning to these words. This would be a flimsy foundation indeed for injunction.

Passing over these trivial features of the plaintiff's papers we come to the one central event relied upon by the plaintiff, and set forth in the complaint and repeated in the affidavits. It is the alleged assault upon the night fireman, coupled, the same evening, with the attempt to shoot the general superintendent. These events demand particular consideration, because without them the plaintiff's papers become nearly frivolous.

The plaintiff's night fireman alleges that on the night of November 12, 1920, he was assaulted. Nobody saw it, nobody corroborates the fireman's statement except that blood and bruises were seen on his head and face by others. His wounds were examined and described by Dr. Shaw, so that there can be no doubt that he was hurt in some manner. But assuming that the fireman told the exact truth about it all, how does that impugn the conduct of these defendants? How is the incident relevant here? The assailants are unknown. The fireman could not identify them. It may be assumed that he knew most of the strikers, at least by sight, yet the men who assaulted him were strangers to him. The defendants indignantly deny any complicity in the assault or knowledge of it. To charge this atrocity against them without proof would be monstrous. Not a rule ever known in law or equity would sanction it. The incident is wholly alien to this case.

On the same evening George N. Allen, the plaintiff's general superintendent, claims to have been fired upon. Nobody saw this assault although other people

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heard the shots. Four bullets were fired at the superintendent and immediately thereafter Allen showed people his hat through which a bullet had ploughed its way. But the would-be assassins are unknown. Not a fragment of evidence points towards the defendants. There is no nexus between the strikers and the felons. Nothing connects the defendants in any manner with this dastardly deed. They are strangers to the outrage. It is true that the event happened during the progress of the strike, but are workingmen on a strike to be charged without rhyme or reason with every crime committed in the neighborhood? If not, then how is the incident relevant here? Counsel cannot seriously urge this unidentified felony as a basis for injunction. Who is to be enjoined? Not innocent men, surely; not men against whom there is no evidence whatever, either of knowledge or complicity. Therefore, even if the event be taken as true, it counts for nothing here.

But the story cannot be accepted too implicitly by the court. Allen's testimony has been seriously shaken. He is arraigned as an impostor. It is charged that in West Virginia, in 1912, Allen enacted a spurious scene quite similar to this. There he claimed to have been assaulted, robbed, gagged and bound by footpads. Afterwards he signed a written confession, so the defendants allege, admitting that he had bound and gagged himself and "faked" the holdup. These grave charges against Allen are presented to the court, not by mere nondescripts, but by the affidavits of three public officials of Wheeling, West Virginia, and by a member of the bar of that city. One of these men is now sheriff of the county, one is a deputy sheriff and one is a member of the "plain clothes squad." At the time of the alleged holdup they each held office; one was the prosecuting attorney, one was



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chief of police, one was a city detective and the other was a police officer, and they were the officials in charge of the prosecution of the supposed highwaymen. These men are trusted, experienced public servants and seem worthy of belief.

And the story is vouched for to some degree by the affidavit of Allen himself. It is true that he still insists that he "was actually assaulted and waylaid and seriously injured," but he admits that he was suspected of having framed up the robbery and that two detectives "put him through the third degree," and read a written statement over to him. And he does not dispute that the statement contained the matter set forth by the Wheeling officials but he says that he is now unable to recollect what it contained, and he seems to account for this failure of memory by saying that the detectives "grilled him until he hardly knew what he was about."

Equity requires those who seek equity to come into court with clean hands, but if this Wheeling story be true, Allen's hands are soiled nearly beyond purification. If the testimony of these accredited public officials of West Virginia is to be accepted, it utterly destroys the evidence of Allen and taints the plaintiff's whole case with fraud and imposition. This expression, however, is not intended in any manner to reflect upon the plaintiff's attorneys. They are men of the highest standing in their profession and I assume that they knew nothing whatever of Allen's previous history and nothing concerning the West Virginia episode until it was divulged by the defendants' affidavits.

The plaintiff's superintendent does not rest supine under this attack upon his character. In addition to his own vigorous denial he has presented an affidavit which shows that the records of the Ohio Valley Gen-

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eral Hospital indicate that he was in fact a patient at that institution from January 10, 1912, the date of the alleged holdup, to January 15, 1912. He has also presented evidence from the Chase Motor Truck Company, and from Aurin A. Chase, its president, and from Carleton A. Chase, president of the Fire Trust and Deposit Company, that he is a man of capacity, character and integrity. These certificates of character show that the Chases, at least, reposed, and do now repose, full faith and confidence in Allen. Thus a question is presented as to the credibility of the plaintiff's general superintendent.

It is not, however, necessary to pass upon the question here, or to hold that Allen is an impostor. Accepting all that he says as true his story reflects in no manner upon the strikers. It is wholly irrelevant to this controversy; an utter nullity. Therefore it must be disregarded.

Eliminating then the attacks upon the night fireman and the superintendent, what is left? Without these the strike has been uncommonly orderly and temperate — almost tame. This impression is particularly confirmed by the affidavit of Corporal Harold C. Herrick, the officer in command of the state troopers called to Hoosick Falls for the very purpose of watching the strikers and preserving order. After giving his observations in some detail he concludes by saying "that the general conduct of the strikers at all times during said period (twelve days) was beyond criticism." The station agent of the Boston and Maine Railroad, and the baggage master, and a newspaper reporter, all disinterested spectators, concur with Corporal Herrick in commending the quiet, orderly aspect of the strike.

Denuded of all impertinent matter, therefore, and reduced to a sediment, the charge against the working-

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men is this: They have gone on a strike and have resorted to picketing; that is, they have been trying to persuade others not to take their places. This is the "head and front of their offending." This is not enough.

It is urged that the injunction will do no harm because the defendants are to be restrained only from doing unlawful acts and perpetrating crime. But the citizen cannot be restrained from doing an unlawful act until there is evidence that he intends to do such an act. It casts opprobrium upon a person to assume that he will commit crime. And, in any event, equity has no criminal jurisdiction. An injunction order is no menace to criminals. Felons cannot be deterred from crime by injunction. The Penal Law is a standing injunction against crime. The penalties for crime are tenfold more severe than the chastisement for contempt of court. If the defendants are committing crime, the quick, summary, regular remedy is arrest and prosecution.

Many publicists and some jurists have taken the position that injunctions ought never to issue in labor disputes. The congress of the United States has nearly said that. I should not want to go quite to that length. Lawlessness and violence ought, perhaps, in an extreme case, to be restrained by injunction, but the courts should not carelessly cast the weight of their mandates into the strife between employers and employees.

In an evenly balanced, bitter, long drawn out labor struggle, an edict of the court, leveled at the strikers, shakes the morale of the workingmen. This is not the purpose of an injunction, although it is frequently, and perhaps generally, the purpose of the employer who seeks it. The function of an injunction order in a labor dispute is to restrain lawlessness, when there is lawlessness, and when this is likely to cause irre-

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parable damage. When there is no lawlessness, and no proper grounds to apprehend it, there should be no injunction. The courts do not take sides in this ceaseless struggle between capital and labor. They stand indifferent. They intervene only when the law is trampled upon. They interpose the arm of authority only to restrain those who invade the rights of others.

The moral effect of an injunction order in such cases is tremendous. At once it gives the impression in the community that the strikers have violated the law. The court seems to have taken a hand in the struggle. This is the laymen's view. The injunction, thus shaping public opinion, is often decisive.

In exercising its discretion the court cannot shut its eyes to this aspect of the case or ignore the far-reaching psychic effect of its mandate. Therefore, if equity is to be done, the greatest caution should be observed in issuing injunctions in strikes. There should be grave provocation. Strained constructions of the words employed by strikers is not enough. Surmise and suspicion are not sufficient. Unusual vigor of speech among the strikers, now and then, or groups of laborers assembled, here and there, will not suffice. Injunctions cannot rest in such grave controversies upon such trivial foundations. And of course it is idle to contend that the depredations of unidentified miscreants, or the crimes of unknown criminals, can move a court of equity to issue an injunction in any case against any citizen.

In view of this reasoning I have concluded that the injunction order should be vacated in every particular; but I think I ought to add that the defendants should not construe this as a grant of license to them. Any excesses or violence or depredations or destruction of property will result instantly in another injunction.

**Ordered accordingly.**

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JOSEPHINE KEMMELICK, a Lunatic, by EDWARD G. KOREN, Appointed next Friend of Said JOSEPHINE KEMMELICK, a Lunatic, Plaintiff, *v.* LOUIS KEMMELICK, Defendant.

(Supreme Court, Erie Special Term, January, 1921.)

**Actions — when may not be maintained by alleged "next friend" of a lunatic — marriage — default — evidence — parties — Code Civ. Pro. § 1748.**

An action by the "next friend" of a lunatic as permitted by section 1748 of the Code of Civil Procedure, should be brought and prosecuted in the name of the "next friend" and not in the name of the lunatic. (P. 200.)

Upon a petition setting forth the alleged insanity of a wife an order was made and entered appointing petitioner as "next friend" for the purpose of maintaining an action for the annulment of the marriage of plaintiff to defendant. Upon application for judgment as by default it appeared in answer to questions asked by the court, that the petition was presented and the action brought at the request of defendant and that instead of being the "next friend" of the wife, the plaintiff all the time had been acting as the "next" and best friend of the defendant. *Held,* that the application for judgment should be denied. (P. 199.)

Where, notwithstanding queer and peculiar acts on the part of the wife shortly after the marriage, it appears that they lived together for four years before she was declared insane, and had two children, and the evidence does not justify a finding that she did not at the time of the marriage understand the nature, effect and consequences thereof, the annulment will be denied even though all other reasons for rejecting the application for judgment should fail. (P. 202.)

The order in this case "that an action may be maintained" by plaintiff as "next friend" did not authorize the bringing of the action by him without making the wife a party defendant. (P. 201.)

ACTION for the annulment of a marriage.

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WHEELER, J. This action is brought to annul the marriage between the plaintiff and the defendant on the alleged ground that at the time the marriage took place in November, 1908, the plaintiff was a lunatic, and her insanity is incurable.

On the 17th day of December, 1920, Edward G. Koren presented a petition to this court setting forth the alleged insanity of the plaintiff, and asking that an order be granted appointing him as *next friend* of the plaintiff "for purpose of maintaining this action for the annulment of the marriage, pursuant to sections 1747 and 1748 of the Code of Civil Procedure." On this petition an order was made and entered providing "that an action may be maintained by Edward G. Koren as next friend of Josephine Kemmelick" for the anulment here asked.

Thereupon this action was brought in the form indicated in the caption to the action. No answer was interposed by the defendant, and the plaintiff then proceeded before this court to give evidence for the purpose of obtaining judgment asked as by default.

The proceeding was so unusual that the court proceeded to ask questions for itself, on the hearing.

It then developed that Koren, the so-called next friend of the plaintiff, presented the petition and brought this action at the request of the defendant himself. The defendant on the witness stand testified to the same thing. It thus appears that instead of being the "next friend" of the plaintiff Koren all the time in fact has been acting as the "next" and best friend of the defendant, and without seriously considering the real and true interests of the plaintiff.

Under these circumstances this court ought not to grant the annulment asked.

The case of *Reed* v. *Reed,* 106 Misc. Rep. 85, holds that an action to annul a marriage on the ground of

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the insanity of a party to it can only be maintained by the lunatic, and cannot be maintained by the other party to it.

In that opinion Mr. Justice Hinman discusses the proper construction to be placed on the various sections of the Code of Civil Procedure relating to such actions, and reaches the conclusion stated above.

It was to avoid the force and effect of this decision that the defendant in this action undertook to get around his own disqualification to bring an action for annulment by procuring the action to be prosecuted against himself by an alleged "next" friend. We do not think the court should tolerate this practice. We are unable to discover how the interests of the plaintiff can be advanced in any way by an annulment of the marriage. On the other hand we can well see how the interests of the alleged defendant may be served by such an annulment, which would relieve him of the duties and obligations of a husband to the unfortunate plaintiff.

On principles of justice and equity we think the court should not permit itself to be used for any such purpose.

Independent of these considerations we are of the opinion the action is not well brought.

We are of the opinion that if an action is to be brought by the "next friend" of a lunatic, as permitted by section 1748 of the Code of Civil Procedure, the action should be brought and prosecuted in the name of the "next" friend, for the purpose named, and not in the name of the lunatic.

This, indeed, seems to be the practice pursued in other cases. *Coddington* v. *Larner*, 75 App. Div. 532; *Meekins* v. *Kinsella*, 152 id. 32; *Anderson* v. *Hicks*, 150 id. 289.

So too in actions brought by a parent, pursuant to

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section 1744 of the Code, to annul the marriage of a child on the ground such child had not reached the age of legal consent. *Fero* v. *Fero*, 62 App. Div. 470.

In such an action where the action is prosecuted by the "next friend" of the lunatic the lunatic becomes a necessary party defendant, and the case cannot proceed without such lunatic being brought into court. *Coddington* v. *Larner*, 75 App. Div. 293; *Anderson* v. *Hicks*, 150 id. 293.

In the latter case the court said: "*But the plaintiff suing as a relative does not stand in the shoes of the alleged lunatic as to represent him by substitution.*" Neither does the "*next friend*" *represent the lunatic so* "*as to represent her by substitution.*"

The order of the court permitting an action to be brought is nothing more than permission to sue. The insane and infants are in a sense regarded as the wards of the court and permission to bring suit simply authorizes suit brought in the proper way with the proper defendants, and to reach the case in hand included the lunatic as a party defendant. The order made may be likened to one permitting a party to sue a receiver appointed by the court.

The same rule requiring the lunatic to be made defendant has been repeatedly held to be the law in cases where a parent brings an action to annul a marriage made by the child before reaching the age of consent. *Fero* v. *Fero*, 62 App. Div. 470; *Wood* v. *Baker*, 43 Misc. Rep. 310.

An examination of the order made permitting action to be brought to annul the marriage in this case in no way departed from the rule. It was an order "*that an action may be maintained by Edward G. Koren as next friend.*" It did not authorize the action to be brought in the name of the plaintiff without making the insane person a party defendant.

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To grant an annulment in this case would be to dispense with the safeguards which the law throws around judicial proceedings for the protection of the helpless and incompetent.

It might be further said that in our judgment the proof fails to make out a satisfactory case even though all the other reasons for rejecting the application for judgment should fail. Mere insane delusions or hallucinations are not sufficient in and of themselves to annul a marriage, but before such a contract can be cancelled on the ground of lunacy or for want of understanding it must be satisfactorily shown that the party in whose interest or right the action is brought was mentally incapable of understanding the nature, effect and consequences of the marriage. *Meekins* v. *Kinsella,* 152 App. Div. 36, and cases cited.

I do not think the evidence establishes such a case. It is true certain queer and peculiar acts on the part of the wife are testified shortly after the marriage to the defendant, but they lived together for some four years after the marriage before she was declared insane. She bore him two children, and I do not think the evidence adduced would justify the court in finding the wife did not at the time of her marriage understand the nature, effect and consequences of the marriage.

For these reasons the application for judgment must be denied.

Application denied.

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Misc.] Surrogate's Court, Queens County, January, 1921.

## Matter of Proving the Last Will and Testament of LILLIAN YONGEN CUTLER, Deceased, as a Will of Real and Personal Property.

(Surrogate's Court, Queens County, January, 1921.)

**Wills — when probate decreed — husband and wife — Decedent Estate Law, § 35.**

Upon the death of a wife in this state, her last will and testament, executed in another state while she was unmarried, may be admitted to probate in this state, under section 35 of the Decedent Estate Law, though her surviving husband was not mentioned in the will.

PROCEEDING upon the probate of a will.

Elmer E. Studley, for petitioner.

Carl Graff, for contestant.

NOBLE, S. The instrument offered for probate in this proceeding was executed by the decedent, who was then unmarried, on August 12, 1903, in the state of New Jersey, where the decedent then resided.

On March 28, 1908, the decedent was duly married to Edgar G. Cutler, and shortly afterward she and her said husband moved into the state of New York, of which state she was a resident at the time of her death, August 20, 1920.

The husband, Edgar G. Cutler, is not mentioned in the said instrument.

No issue was born of this marriage, but besides her husband the decedent left surviving her Marie Yongen Heatly, a daughter by a previous marriage, who is of full age.

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Objection was made to the probate of the said instrument by Edgar G. Cutler, husband, on the ground that it is void under section 36 of the Decedent Estate Law.

At the time the instrument was executed section 36 of the Decedent Estate Law was in effect, and provided as follows: "A will executed by an unmarried woman shall be deemed revoked by her subsequent marriage."

At the time of the death of the decedent, however, section 36 of the Decedent Estate Law was not in effect, having been repealed by Laws of 1919, chapter 293, section 1, in effect September 1, 1919, which provided as follows:

"§ 35. Revocation by marriage. If after making any will, such testator marries, and the husband or wife, or any issue of such marriage, survives the testator, such will shall be deemed revoked as to them, unless provision shall have been made for them by some settlement, or they shall be provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and such surviving husband or wife, and the issue of such marriage, shall be entitled to the same rights in, and to the same share or portion of the estate of said testator as they would have been, if such will had not been made. No evidence to rebut such presumption of revocation shall be received, except as herein provided."

There is no dispute as to the facts in the case and the question to be decided is whether the law governing the making of a will by the said decedent and its validity was that in effect at the time of the execution of the instrument, or that in effect at the time of her death.

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There is nothing in section 35 of the Decedent Estate Law which makes it retroactive, or limits its application in any way.

In *Moultrie* v. *Hunt,* 23 N. Y. 394, the Court of Appeals, referring to a will, say: "It is of the essence of a will that until the testatrix's death it is ambulatory and revocable. No rights of property or powers over property were conferred upon any one by the execution of this instrument, nor were the estate, interest or rights of the testator in his property in any way abridged or qualified by that act. The transaction was in its nature inchoate and provisional; it prescribed the rules by which his succession should be governed, provided he did not change his determination in his lifetime." See also *Obecny* v. *Goetz,* 116 App. Div. 807, and cases therein cited, and also *Matter of Tone,* 186 id. 363.

A will being ambulatory and not taking effect until the death of its maker, I am of the opinion that the law to be applied is that in force at the time of the death of the decedent, namely, section 35 of the Decedent Estate Law, and that, therefore, the instrument here offered for probate should be admitted, subject to the provisions of said section 35, and that letters testamentary be issued accordingly.

Probate decreed.

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BLANCHE BUCKLEY, Plaintiff, *v.* BUDDINGTON SHARPE, as Sheriff of the County of Rensselaer, Defendant.

Matter of the Application of BUDDINGTON SHARPE, as Sheriff of Rensselaer County, for an Order Allowing the Deposit in Court of Moneys Received from Sales of Property Belonging to ALBERT G. BUCKLEY.

(Supreme Court, Albany Special Term, January, 1921.)

**Sheriffs — duties of — executions — when motion for an order permitting sheriff to deposit in court before the return day the proceeds of execution sales granted — judgments — General Rules of Practice, rule 6 — Code Civ. Pro. § 723.**

It is the well-settled law of this state that it is the duty of the sheriff, not only to collect the moneys due upon an execution by the return day thereof, but to bring the same into court, or pay it over to the plaintiff or his attorney by such return day. (P. 208.)

A sheriff, having in his hands sufficient funds, the proceeds of sales of property under an execution, to pay the plaintiff's judgment in full, was served with a notice by the trustee under a trust agreement purporting to have been signed by plaintiff, under which the trustee claimed to be entitled to the money due on the plaintiff's judgment and execution. The trustee denied that the trust agreement had been abandoned, as claimed by plaintiff. *Held,* that a motion by the sheriff for an order permitting him to deposit in court before the return day of the execution, the proceeds of the execution sales and be absolved from further responsibility in relation thereto, will be granted, and the issue as to the ownership of the moneys determined either in an action by the trustee to enforce the trust agreement or by an action brought by the judgment creditor, to set it aside (Pp. 211-213.)

Had the time for the return of the execution expired, the judgment creditor's remedy would have been either to compel a return by the sheriff under rule 6 of the General Rules of Practice, or to bring an action for damages against him. (P. 213.)

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The mistake of entitling the motion papers, in the action brought against him as sheriff by one of the judgment creditors, is a mere irregularity which the court under section 723 of the Code of Civil Procedure may correct, where the substantial rights of other parties in interest are not affected. (P. 212.)

The claims of the judgment and attachment creditors of the judgment debtor cannot be settled on this motion, although they have been served with notice thereof, for the right of the party claiming the money being in doubt, the court will relegate her to her action. (Id.)

APPLICATION by the sheriff of Rensselaer county for an order allowing the deposit in court of moneys received from sales of property.

Craymer & Donohue, for plaintiff and others.

Herbert F. Roy, for defendant Sharpe.

Abbott H. Jones, for Edward Dwyer.

Herbert A. Van Kirk, for Greenwich Bank.

W. S. Ostrander, for George R. Little, trustee, etc.

HINMAN, J. This is an application by a sheriff having charge of attachments and executions against a judgment debtor for an order permitting him to deposit with the court or the clerk thereof, any and all proceeds of sales in attachments and executions previously levied by him and now in his hands to await the determination of conflicting rights and priorities of the various attaching and execution creditors.

It is unnecessary to review all of the facts and details in relation to these various attachments and executions. It is sufficient that the plaintiff has recovered a judgment and has issued an execution which is in the hands of the sheriff and that there are sufficient funds to pay the plaintiff's judgment in full, but con-

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flict has arisen over the right of the plaintiff to enjoy the proceeds of such execution. The sheriff has been served with a notice by George R. Little, as trustee, under a trust agreement purporting to have been signed by the plaintiff under which he claims to be entitled to the money due on the plaintiff's judgment and execution. The claim of the plaintiff is that the alleged agreement was abandoned. This, however, seems to be denied by the trustee, who is pressing his claim to the right, as such trustee, to the moneys due under the plaintiff's judgment and execution.

Notice of the sheriff's application for this order has apparently been given to the various judgment creditors of Albert G. Buckley, judgment debtor.

The attorneys for the plaintiff in the action of *Buckley* v. *Sharpe* raise the point that the court has no power to entertain such a motion and to direct the payment of the money into court as prayed for by the sheriff, and they contend that the sheriff has no option under the Code but to pay the money in satisfaction of the judgments in the order of priority in which the warrants of attachment were issued.

My investigation with reference to this contention demonstrates what is occasionally the case, that a proposition of law has been so thoroughly settled over such a long period of time that the principle of the law has been lost to view so completely that it is not easy to find the authorities sustaining it.

It is the well settled law of this state that it is the duty of the sheriff, not only to collect the moneys due upon an execution by the return day thereof, but to bring the same into court, or pay the same over to the plaintiff or his attorney by such return day. This alternative remedy of the sheriff to bring the moneys into court has apparently existed from early times in this state and is the law of the state today. Crocker

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Sheriffs (3d ed.), § 424; Smith Sheriffs, 405; *Nelson* v. *Kerr*, 59 N. Y. 224; *Mills* v. *Davis*, 53 id. 349; *Parker* v. *Bradley*, 46 N. Y. Super. Ct. 244; *Phillips* v. *Wheeler*, 2 Hun, 603; affd., 67 N. Y. 104; *Brewster* v. *Van Ness*, 18 Johns. 133; Code Civ. Pro. § 1366.

The story leading up to the establishment of this principle is well set forth in Smith on Sheriffs, Coroners and Constables at page 405. In as much as this work was published in 1883 and may not be available generally a quotation from the same may be valuable. It reads as follows:

"Disposition of Proceeds.—Formerly, in strictness, moneys collected upon an execution by a sheriff were to be brought into court. Afterward it became a sufficient answer for a sheriff, when sued for not bringing the moneys into court, to say that he had paid them over into the hands of the execution creditor. And, latterly, the general practice has been to pay the proceeds to the execution creditor, or to his attorney. There is no statute governing the subject, and, in this regard, expressly pointing out the sheriff's duty. But the practice has been from the earlier times, for the sheriff to bring the money into court. And this practice is good even at the present time. If there *can* be no doubt as to who is entitled to the proceeds, the sheriff should pay them over to the one entitled to receive them, or to his attorney. But if there be doubt, if there be adverse claimants of the proceeds, the sheriff is not bound, at his peril, to determine the matter, nor need he apply to the court for direction and protection. He may, with the execution and as part of the return thereof, deliver the proceeds to the clerk of the county where the execution is to be returned. This is a payment of the money into court. Under the Code the money might be paid by the sheriff directly to the county treasurer.



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It is better, however, to return the money with the execution to the county clerk, when it is desired to bring the proceeds into court."

The leading authority cited by Smith as sustaining the foregoing is the case of *Nelson* v. *Kerr, supra,* in which the Court of Appeals, per ANDREWS, J. says: "Since the case of *Brewster* v. *Van Ness,* the doctrine there stated has been considered the settled law in this State, and no case has been cited in which it has been questioned. Nor is it perceived that the change in the form of the execution, since the Code, calls for any change of the rule declared in that case. The sheriff has the same means of protecting himself from liability. He may still bring the money into court with his writ, or pay it over to the plaintiff in the execution. The clerks of the several counties are clerks of the court, and the clerk with whom the judgment roll is filed, and where the execution is to be returned, is the proper officer to receive the money, and payment by a sheriff to him is payment into court. If paid to him, he holds it for the party entitled to receive it. There is no statute authorizing a sheriff to pay money collected on execution into court, nor, so far as I know, has there ever been, but the practice has prevailed from early times. In Bacon's Abridgment (tit. Execution, C.), it is said: 'Upon a writ of *fi. fa.,* the sheriff cannot deliver the goods of the defendant to the plaintiff in satisfaction of his debt, but the goods are to be sold, and the money, in strictness, is to be brought into court.'

"It is true that the sheriff, by the former writ in use in this State, was commanded to bring the money 'before our justice,' etc., on the return day, and so were the ancient precedents. But we have not found any authority for the proposition that the mandate of the writ was the sole ground upon which the sheriff

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was entitled to bring the money into court, in discharge of his liability. Forms of writs furnish strong evidence of what the law was when they were devised, and of the duty of the officer to whom they are directed. And it may well be supposed that the right of the sheriff to bring money collected on process into court, was established when the precedents of executions referred to were framed, in view of the manifest justice or convenience of the practice. Section 290 of the Code declares that an execution shall be returnable within sixty days after its receipt by the officer, to the clerk with whom the record of judgment is filed. This is the only section defining the duty of the sheriff upon the subject, and under it the sheriff may, I think, pay the money collected to the clerk, as a part of the return therein provided, although no special mention is made of it in the writ."

The portion of section 290 of the old Code referred to in the above decision is now found in section 1366 of the present Code, in which it is provided that, "An execution * * * must require the sheriff to return it to the proper clerk, within sixty days after the receipt thereof."

I cannot find that the case of *Nelson* v. *Kerr* has been questioned at any time since it was decided, nor can I find any statute tending to modify or reverse the principle there sustained.

It seems that the sheriff need not apply to the court for direction and protection, but there is ample authority for the application which is made by the sheriff in this case. The practice was recognized as proper in the case of *Phillips* v. *Wheeler, supra,* in which it was held that where there was controversy over the proceeds in the hands of the sheriff and he desired to know what to do with them, he could apply to the Supreme Court for direction. It seems, however, that

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in such a case the application of the sheriff is made as a motion in all of the actions in which judgments have been obtained, and in which the judgment creditors become adverse claimants to the proceeds in his hands, and if the judgments happen to have been obtained in more than one judicial district, that the sheriff may apply to the Supreme Court in his own county for directions, notwithstanding that the Code provides that motions upon notice must be made in the county in which the action is triable or in the county adjoining that in which it is triable. *Phillips* v. *Wheeler, supra.*

The sheriff has entitled his papers in this motion in the action brought against him, as sheriff, by Blanche Buckley, one of the judgment creditors. This, however, is a mistake or irregularity which the court under section 723 of the Code is empowered to overlook and correct, where the substantial rights of other parties in interest are not affected. I believe that it is my duty to permit this correction to be made in view of the fact that it seems to be conceded by the attorney for the plaintiff and all others appearing before me, that notice of the application has been given to all of the judgment creditors in interest.

Having decided that I will entertain the application and permit this correction to be made, entitling the application in all of the several actions affected, it may be well for me to intimate still further the resulting status of the parties affected by this decision.

I think it is clear as was said by the court in the case of *Wilson* v. *Wright*, 9 How. Pr. 459, that the adverse claims of the judgment and attachment creditors cannot be settled upon this motion. For, wherever the right of the party claiming the money is in doubt, the court will refuse to interfere on motion and will turn him over to his action.

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Upon the payment of these moneys into court by depositing them in connection with the return with the clerk of the court in accordance with the foregoing authorities, it would seem to me that the question at issue as to the ownership of these moneys would properly be determined in an action by the trustee to enforce the said agreement or by the judgment creditor, Blanche Buckley, to set it aside.

The action of Blanche Buckley against the sheriff seems to have been prematurely brought in view of the fact that the time has not yet expired to require him to make his return. If that time had expired the plaintiff would have a remedy either to compel a return under rule 6 of the General Rules of Practice, or to bring such an action for damages against the sheriff.

In view of the fact that the return day has not yet arrived and the sheriff has the right to pay these moneys into court voluntarily or by order of the court, the remedy of the plaintiff, Blanche Buckley, is not in an action against the sheriff or an order in an attachment proceeding under rule 6, but to have the issue determined in an action between the parties interested.

Upon the payment of the moneys into court before the return day, the sheriff will be absolved from all further responsibility.

The motion is granted, with ten dollars costs

Motion granted, with ten dollars costs.

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Matter of the Application of CENTRAL UNION TRUST COMPANY OF NEW YORK, as Trustee under the Will of LAURA A. DELANO, Deceased, of the Several Trusts by Said Will Created for the Benefit of JOHN ARMSTRONG CHANLER, WINTHROP ASTOR CHANLER, ELIZABETH WINTHROP CHAPMAN, WILLIAM ASTOR CHANLER, LOUIS STUYVESANT CHANLER, MARGARET LIVINGSTON ALDRICH, ROBERT WINTHROP CHANLER and ALIDA BEEKMAN EMMET, Respectively, for Leave to Sell Certain Real Estate Pursuant to Sections 105 and 107 of the Real Property Law.

(Supreme Court, New York Special Term, January, 1921.)

**Real Property Law, §§ 105, 107 — when sale of real estate by a testamentary trustee will be approved — evidence.**

A sale of real estate by a testamentary trustee pursuant to leave granted under sections 105 and 107 of the Real Property Law will not be rejected, because, pending the application for leave to sell and a hearing thereon, there has been an increase in values. The sale will be approved at the price offered, which the testimony shows to have been fair when made and accepted subject to the approval of the court.

APPLICATION by a trustee to sell certain real estate.

Miller, King, Lane & Trafford (James Gore King and Walcott P. Robbins, of counsel), for Central Union Trust Company of New York, as trustee, etc., petitioner.

Egerton L. Winthrop, Jr., guardian *ad litem* for Christopher Temple Emmet and others.

Egerton L. Winthrop, guardian *ad litem* for C. T. Emmet, Jr., and others.

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Charles A. Runk, as a friend of the court.

William Bondy, referee.

McAVOY, J. All of the testimony has been read. The views of the experts are highly speculative and as usual give ground for assuming that they were subject to change within the month if realty conditions were less abnormal than at the time of testimony. I do not agree with the referee that sale ought to be rejected because a forward leap in values has been made pending the application to the court for leave to sell and the hearing thereon. Such a rule carries with it a great detriment to and a lack of stability in the results of these proceedings. If the bargain is good when made the court ought to give the advantage to the buyer. The seller has all that he intended to get and cannot ask more. Neither should a court adopt an attitude which in effect says to the bargainer: You may have the land if we do not find a way to repudiate the contract through securing a higher bid. After promising to convey to a buyer if the bargain be approved by the court, the time of value taking is the date of the contract. Any other rule is unworkable, leads to temerity in making these sales by trustees where there are infant remaindermen and would inhibit the sale of almost any land which had the prospect of a use pending a costly, lengthy and difficult proceeding. The sale will be approved as of the price offered which the testimony shows to have been fair when made and accepted subject to judicial approval, and to have been inflated as of the date of the reference by an unusual demand not necessarily likely to continue.

Ordered accordingly.

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THE PEOPLE ex rel. H. J. MULLEN CONTRACTING COMPANY, INC., Relator, v. CHARLES L. CRAIG, as Comptroller of the City of New York, JOHN F. HYLAN, as Mayor of the City of New York, and PHILIP BEROLZHEIMER, as Chamberlain of the City of New York, Respondents.

(Supreme Court, Kings Special Term, January, 1921.)

**Mandamus — when denied against comptroller of the city of New York — contracts — municipal corporations — fraud — Greater New York Charter, §§ 149, 419.**

Mandamus lies against public officers to compel the performance of ministerial duties which are clearly absolute and imperative. (P. 217.)

Where although the various engineers and auditors whose duty it is, as a condition precedent to the issuance of a warrant of the city of New York on account of work done pursuant to a municipal contract involving an expenditure of more than $1,000, to examine into the matter, have certified that work of the character and quantity entitling a contractor to receive a progress payment in a certain sum, has been done, the city comptroller may delay payment pending an examination by him under section 149 of the Greater New York Charter of the contractor under oath with respect to facts and circumstances surrounding the public letting of the contract, in order to determine whether it was of the character provided in section 419 of the Greater New York Charter, and whether there was collusion in the bidding or fraud in the performance of the contract. (Pp. 222, 223.)

Where the contractor refuses to fully submit to such an examination, his application for a writ of peremptory mandamus to compel the issuance of the warrant will be denied as matter of discretion. (P. 225.)

The exception in said section 149 of the Greater New York Charter which refers to "claims arising under the provisions of contracts made at public letting in the manner provided by section 419 of this act" was intended only to prevent an inquiry into the manner in which a contract validly entered

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into by the city has been performed, and not to one where the circumstances indicate that the contract originated in fraud; the exception, therefore, is not controlling in the present case. (P. 224.)

APPLICATION for a writ of mandamus.

John C. Wait, for relator.

John P. O'Brien, corporation counsel, for respondents.

Charles L. Craig, comptroller of the city of New York, in person.

BENEDICT, J. This is an application for a writ of mandamus requiring the comptroller to deliver to the relator a warrant of the city of New York for $35,244 on an account of work done under a contract for regulating, paving, etc., Third avenue from First to Thirteenth streets, College Point, borough of Queens.

The writ of mandamus, generally speaking, issues only in cases where there is a clear legal right in the relator and there is no other adequate and legal means to obtain it. In the case of public officers it issues to compel the performance of ministerial duties which are clearly enjoined as absolute and imperative. The writ is prerogative in its character to the extent that its issue is not of right but of discretion. *People ex rel. McMackin* v. *Police Commissioners,* 107 N. Y. 235; *People ex rel. Faile* v. *Ferris,* 76 id. 329. The discretion to be exercised is a judicial one. *People ex rel. Gas-Light Co.* v. *Common Council,* 78 N. Y. 56; *Shepard* v. *Oakley,* 181 id. 339; *People ex rel. McClelland* v. *Dowling,* 55 Barb. 197.

The present application involves the question whether, under the charter of the city of New York,

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the comptroller has the power to exercise any judgment or discretion regarding the payment of claims against the city of New York arising under contracts, or whether he is merely the custodian of the city's funds and obliged to pay therefrom any and all claims against the city upon contracts which have been made after public letting. The facts in the case are set out at considerable length in the petition and affidavits of the relator and in the answering affidavits submitted on behalf of the respondent. It will not be necessary to recite them in detail here. The contract referred to in the petition was one entered into after compliance with the charter forms and provisions regulating the giving out of contracts by public letting. The relator contends that the comptroller is precluded from any inquiry under section 149 of the charter to ascertain whether in point of fact there has been a valid contract awarded at a public letting of the character provided in section 419 of the charter. If the relator be correct in that proposition, then the comptroller is stripped of all power to conduct any inquiry into the validity of such a claim further than to ascertain from the reports of various officials whether the work required to be done by the contract has been done in the manner therein prescribed.

In the present case it has been certified by the various engineers, or auditors, whose duty it is to examine into the matter as a condition precedent to the preparation of the warrant, that work of the character and quantity entitling the claimant to receive the progress payment in the sum of $35,244 has been done by the contractor.

The only question, therefore, which requires solution in the determination of this application is whether the comptroller may examine the claimant under oath with respect to facts and circumstances surrounding

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the public letting of the contract in order to ascertain whether it was of the character provided in section 419 of the charter. If it were, the relator is doubtless right in seeking payment by means of this writ. Section 419 is the familiar one providing for the public letting of contracts for work to be done or supplies to be furnished where an expenditure of more than $1,000 is involved. It confers upon borough presidents and heads of departments the power, without the consent or approval of any other department or officer of the city government, to award the contract to the lowest bidder, unless the board of estimate and apportionment, by a three-fourths vote of the whole board, shall determine that it is for the public interest that a bid other than the lowest should be accepted. In form the contract in question appears to have been regularly made pursuant to the provisions of the section referred to.

The charter, by section 149, provides further as follows: "* * * The comptroller may require any person presenting for settlement an account or claim for any cause whatever, against the corporation, to be sworn before him or before either of the deputy comptrollers, touching such account or claim, and when so sworn, to answer orally as to any facts relative to the justness of such account or claim. Willful false swearing before the comptroller or deputy comptrollers is perjury and punishable as such. He shall settle and adjust all claims in favor of or against the corporation, and all accounts in which the corporation is concerned as debtor or creditor; but in adjusting and settling such claims, he shall, as far as practicable, be governed by the rules of law and principles of equity which prevail in courts of justice. No claim against the city or against any of the counties contained within its territorial limits, or payable in the

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first instance from moneys in the city treasury for services rendered or work done or materials or supplies furnished except (1) claims reduced to judgment, or (2) awards, costs, charges and expenses duly taxed or ordered paid in judicial proceedings, or (3) claims arising under the provisions of contracts made at public letting in the manner provided by section four hundred and nineteen of this act, or (4) claims settled and adjusted by the comptroller, pursuant to the authority of this section, shall be paid unless an auditor of accounts shall certify that the charges therefor are just and reasonable; and except as hereinbefore otherwise provided, all contracts with the city or any of such counties or with any public officer acting in its or their behalf, shall be subject to such audit and revision by the department of finance. * * *"

It appears from the comptroller's affidavit that on November 11, 1920, a warrant for $35,244 in favor of the petitioner on account of the contract in this proceeding was made ready by the bureau of audit of the comptroller's department, and pursuant to the comptroller's personal direction such warrant was sent to the comptroller's desk, together with the contract and the voucher upon which such warrant was based. The comptroller states that this direction was given by him in order that he might conduct such further inquiry and perform such duty of supervision as he felt that he was obliged to discharge for the protection of the city in this case. He lays particular stress upon the fact that prior to November 11, 1920, public charges had been made concerning the alleged fraudulent character of contracts entered into on behalf of the city, whereby, under pretense of open competitive bidding of the character contemplated by section 419 of the charter, collusive and illegal bidding had taken place at sums greatly in excess of fair and

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reasonable prices for work to be done by contractors for the city; and in this connection he calls attention, in a general way, to the proceedings before the joint legislative committee on housing, and before grand juries in the county of New York, and to the further fact that numerous criminal prosecutions had been instituted against individuals, firms and corporations who had theretofore entered into contracts with the city, some of which prosecutions had resulted in the defendants pleading guilty.

The comptroller shows that certain information concerning the dishonest and fraudulent character of bidding for public work of the city, particularly in the borough of Queens, had come to his attention, and that he had communicated with the heads of the different city departments in regard to it, as well as with the legislative committee, and that on account of these facts and of others which he refers to concerning the relations between this relator and other bidders for city work he desired to examine the relator through its president concerning the claim for which the warrant had been asked. He states that he notified Mr. Mullen, the president of the relator, to submit to an oral examination under oath before the comptroller before the warrant would be delivered. He shows further that the president of the relator appeared for such examination, which was begun on November 11, 1920, but that before it had been concluded by the comptroller, and after Mr. Mullen had testified to some extent concerning the contract, he requested an adjournment in order that he might produce certain papers, which he said were in his possession, in connection with the contract, and thereupon the examination was adjourned in order to enable him to produce the papers and to obtain further information required by the comptroller. The president of the relator did

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not, however, return to the comptroller's office for further examination, and although the comptroller endeavored for a number of days to get into communication with him, he never came back for the purpose of continuing the examination, and such examination has never been concluded. Extracts from his testimony are contained in the comptroller's affidavit.

In view of all these circumstances and the relations existing between the relator and certain materialmen referred to in the papers, it does not seem to me as though this were a case where the court ought to exercise the discretion reposed in it to compel the delivery of the warrant which the comptroller has in his hands. If a writ of mandamus were to issue, it would be tantamount to a decision by the court that the comptroller had no right in this case, or in other similar cases, to conduct the examination of the claimant under section 149 of the charter, for the purpose of inquiring into the question whether contracts which are made after public bidding must be regarded as binding upon the city of New York, even though they were originally obtained by fraudulent or collusive means, as the comptroller states that in his opinion was apparently the case here. I am not prepared to subscribe to any such doctrine. Fraud and collusion in obtaining contracts for public work are always a proper subject of inquiry, and I think that the comptroller of the city of New York was not only fully justified by the facts stated in the papers in the present case in desiring to prosecute the fullest possible inquiry into the *bona fides* of this contract, but that he would have been derelict in his duty if he failed to make such inquiry. In the case of public work running into many millions of dollars each year it is in the highest degree important for the protection of the taxpayers of the city that some official

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should be clothed with the fullest powers of inquiry as to honesty, good faith and fairness of contractors who bid for public work. As I read the charter, it was the intention of the legislature not to make the comptroller of the city of New York merely an automaton, who must perfunctorily audit and pay all claims against the city which appear on their face to be regular. Rather I think it must be presumed to have been the legislative purpose to throw around the public treasury of the city the highest possible safeguards against fraud or collusion by conferring upon the comptroller, as the responsible head of the finance department of the city, the widest possible powers of investigation into the merits of all claims. This court should not be astute in finding technical reasons for limiting or destroying the comptroller's power of investigation surrounding the letting of the contract where the circumstances are such as to arouse reasonable suspicion, nor should it seek to substitute its judgment for the *quasi* judicial discretion of the comptroller in regard to the validity of claims presented to him in cases where there is any ground for believing that the contract was obtained by fraud.

The relator does not come before the court with clean hands. He has refused to submit fully to the oral examination provided for in section 149 of the charter. His learned counsel contends that that examination was extended by the comptroller beyond its proper scope. In this contention I cannot agree, because I think that under the circumstances as disclosed the matters upon which information was sought were pertinent to the examination, and properly came within the scope of the requirement of section 149, that he "answer orally as to any facts relative to the justness of such account or claim." I construe the exception in section 149 of the charter, which refers

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to " claims arising under the provisions of contracts made at public letting in the manner provided by section four hundred and nineteen of this act," as not controlling in the present case. Fraud vitiates all contracts, and it is inconceivable that the legislature intended by this exception to create an estoppel against the city which would prevent an inquiry by the comptroller into the validity of the contract itself in cases of fraud. I think that this exception in the statute was intended only to prevent an inquiry into the manner in which a contract validly entered into by the city has been performed, and not to one where there were circumstances pointing to the probable conclusion that the contract originated in fraud.

In conclusion, I will refer to a few cases where our courts have had occasion to consider applications similar to the one now before this court. In *People ex rel. Beck* v. *Coler*, 34 App. Div. 167, Mr. Justice Cullen, conceding the right of the court to compel the comptroller by mandamus to pay the amount of a contract if the right to payment is clear, stated that the rule would be different if the city repudiated or denied the existence of the obligation; and he was particular to emphasize in that case that no allegation whatever of fraud was made. In *People ex rel. Lentilhon* v. *Coler*, 61 App. Div. 223, the Appellate Division in the first department went much further, and held that the payment of a debt will be enforced by mandamus only where upon both the facts and the law it clearly appears that there cannot be a defense to the claim, and therefore it confirmed an order of the Special Term denying a motion for a peremptory writ of mandamus directing the defendant to deliver to the relator a warrant on the chamberlain for an amount alleged to be due him under a contract with the city. The Court of Appeals dismissed the appeal

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taken by the relator, Judge Edward T. Bartlett saying that it was clearly within the discretion of the Supreme Court to remit the parties to a common-law action. See 168 N. Y. 6. In *People ex rel. Guidet* v. *Green,* 66 Barb. 630, the General Term in the first department held that a mandamus will not lie to compel the payment of a money demand on contract where a proper remedy by action exists, Ingraham, P. J., saying: "More especially is such a rule proper where the facts upon which the claim is based are disputed." Mr. Justice Brady, in a concurring opinion, stated that "Neither in England nor in this state has a mandamus been allowed where there was a remedy by action and a reasonable doubt as to the validity of the claim, or any conclusion that it should be examined by due process of law."

I am constrained by the foregoing considerations to deny the present application, and this I do in the exercise of discretion, with ten dollars costs.

Ordered accordingly.

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THEODORE MICHAELS, Plaintiff, *v.* CHARLES FLACH, as Sole Executor of the Last Will and Testament of CHRISTOPHER KIENZLE, Deceased, Defendant.

(Supreme Court, Kings Trial Term, January, 1921.)

**Parent and child — father cannot be released by separation agreement with wife from obligation to support his infant child — executors and administrators — claim against decedent's estate for support of an infant — accounting — Code Civ. Pro. §§ 2680, 2681.**

The father of an infant is primarily liable for its maintenance, and even though by the terms of a separation agreement the mother assumes liability for the infant's maintenance, during her life, the obligation of the father continues after the death of the mother until the child becomes of age.



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A separation agreement in terms released the father from all claims for the support and maintenance of his infant son during the mother's life. At her death the son went to live with his uncle who, after diligent search, was unable to locate the father. The father's will made no provision for the child who is still a minor. The uncle presented to the executor of the father's estate a duly verified proof of claim for the maintenance, education and support of the infant son for the six years next succeeding the death of his mother. No notice was taken of the claim except by reference in the account of the executor, filed nearly a year after the presentation of the claim. Prior to the institution of a proceeding for the judicial settlement of the accounts of the executor, to which the uncle was not made a party nor included as a creditor of the estate, an action to recover the amount of the claim so presented was brought by the uncle on the theory that the debt sued on was based upon a claim or debt against defendant's testator as provided by sections 2680 and 2681 of the Code of Civil Procedure and the separation agreement was pleaded in bar. It appeared that no part of the money given by the father to the mother for the support of herself and child, at the making of the separation agreement, remained unexpended at the death of the mother who did not leave sufficient funds to bury her. *Held*, that the separation agreement did not release the father from the payment of plaintiff's claim, was not a bar to the action and that the plaintiff was entitled to judgment for the full amount claimed, with interest from the date of grant of letters testamentary.

ACTION upon contract.

Patrick J. O'Beirne, for plaintiff.

Halbert & Quist, for defendant.

FAWCETT, J. This is an action brought by the plaintiff to recover the sum of $2,218 on an implied agreement to pay for the maintenance, education and support of John C. Kienzle, the infant son of the defendant's testator, from the time said infant son was nine years of age, when his mother, Evelyn Kienzle, died, up to his sixteenth year. The agreed statement of facts submitted for decision follows:

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The plaintiff for the period of time mentioned in the complaint had control and custody of the infant son of the testator and supplied the necessaries alleged therein, and the amount charged for the maintenance of the infant, to wit, $2,218 was reasonable. That on May 31, 1904, the father and mother of the child executed a separation agreement in the 3d paragraph of which it was agreed that for the sum of $4,028 paid to the mother, the mother released the father from all claims for support and maintenance of the child during her natural life and it was further agreed that the wife should retain her dower interest in the premises at No. 101 North Ninth street, Brooklyn, until the father should sell the same and that upon the sale the father should pay to the general guardian of the infant a sum equal to one-third of the purchase price, which should be in lieu of dower and said sum to be used for the maintenance and support of the infant during his minority. That upon the said separation, the infant, being then two years of age, went to live with his mother and lived with her until her death on November 9, 1911, when he was nine years of age. He then went to live with his uncle, the plaintiff, who made diligent search for the father of the child without success, and then resided with the uncle up to the present time. The defendant's testator, the father of the child, died December 21, 1917, in Queens county, leaving a will dated June 11, 1914, which was duly probated and letters testamentary were issued to the defendant executor on August 9, 1918, which will made no provision for his child. The estate of the decedent amounted to $19,342.94 of which $3,750 represents the proceeds of the sale of the premises at 101 North Ninth street, Brooklyn, by the executor in December, 1919. A verified proof of claim was duly served upon the defendant on June 14, 1919, for

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the sum of $2,218, but said claim was neither paid nor rejected and no notice was taken of it until it was referred to in Schedule G of the account filed March 16, 1920. The action upon said claim was brought by the service of a summons and complaint on the defendant on January 3, 1920, and the defendant's answer set up the separation agreement as a bar. The defendant filed his petition and account for a judicial settlement by the Surrogate's Court of Queens county on March 16, 1920, but did not make the plaintiff a party to said accounting, and no notice of said accounting was served upon the plaintiff up to the date of the trial of this action. The said petition did not recognize the plaintiff as a creditor of the estate although it provided that all creditors should be set forth in Schedule D of the account as filed, and it did not contain the name of the plaintiff as a creditor although his claim had been served on June 14, 1919, and it distinctly stated that there were no creditors. Schedule G of the account merely referred to the action now pending between the plaintiff and the defendant without stating whether the claim was accepted or rejected. It simply stated that the said "action is now awaiting trial." While the verified petition in the accounting proceedings states that a notice for creditors to present claims was duly published pursuant to an order of the Surrogate's Court of Queens county and that all claims presented had been duly adjusted and paid, the verified account accompanying the petition and filed on the same day with the petition, March 16, 1920, specifically struck out the allegation of a due and proper advertisement for the presentation of claims by the creditors as required by section 2677 of the Code.

The parties waived the determination of the jury on the facts and defendant moved to dismiss the com-

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plaint and for the direction of a verdict upon the grounds that the complaint does not constitute a cause of action; that the Surrogate's Court has exclusive jurisdiction and that the separation agreement for the consideration named therein released the father from all claims such as that sued upon.

The theory of the complaint is that the debt sued upon was based upon a claim or debt against the deceased as provided for in article 2, sections 2680 and 2681 of the Code of Civil Procedure. The responsibility for the support of the infant son after the death of the mother created an obligation which rested upon the decedent during the period from the decease of his wife until the child attained his majority. The liability for the maintenance of the child was imposed primarily upon the father and even though the mother assumed to maintain the said infant during her lifetime under the terms of the separation agreement, the obligation continued against the father after the decease of the mother at which time the child was but nine years old, and it continued until he becomes of age. The law raises an implied promise to pay where services are necessary for the child, although rendered without actual request of the parent. The complaint alleges and it is conceded that upon the death of the mother a diligent search was made by the plaintiff for the father of the boy, but he could not be located. This obviates the necessity of an actual demand. The father abandoned the child as he never communicated with him from the time of the separation agreement, nor inquired as to his whereabouts at any time before or after the death of the mother and wholly failed to provide for the support of the infant son after the death of the mother, which was an omission to the prejudice of the infant by the father who was under

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an obligation to support his son. The complaint, therefore, constitutes a cause of action.

Plaintiff's proof of claim was duly served on June 14, 1919, and although the executor did not file his petition and account until March 16, 1920, he did not either accept or reject the claim, nor did he take any action whatsoever upon it. Section 2681 of the Code deprives a claimant of the right of action in the Supreme Court only where the executor fulfills the duty imposed upon him in this section, by rejecting the claim and serving notice of rejection. Former section 1822 of the Code and section 2681 which has superseded it are highly penal and drastic statutes and should be strictly construed. A surrogate can exercise only such jurisdiction as has been specially conferred by statute, together with those incidental powers which may be requisite to effectually carry out the jurisdiction actually granted. Those claiming under the order or decree of the surrogate must show affirmatively his authority to make it and the facts which give him jurisdiction. Previous to the amendment of section 1822 by chapter 595 of the Laws of 1895, a surrogate had no jurisdiction to hear and determine a rejected or disputed claim against the estate of a decedent and since that act went into effect the courts have insisted that only by a strict compliance with the provisions of the law could there be any jurisdiction of the surrogate over a disputed claim. *Matter of Martin,* 211 N. Y. 328. The legislature did not change the remedy of a claimant where there was no outright rejection by the executor and neither the plaintiff's nor the defendant's substantive rights were affected thereby. *Carpenter* v. *Newland,* 92 Misc. Rep. 596. The statute expressly reserves the right of a claimant to bring an action where no rejection has been made or served. There was no rejection in this case; on the contrary

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the executor by his silence and failure to acknowledge the claim in any way from the time of the service of the claim June 14, 1919, left the claimant under the belief that the claim might be admitted and paid. In the accounting filed on March 16, 1920, by the executor, he sets forth in Schedule G that the action for the collection of the claim in the Supreme Court is then pending and that the accounting proceeding is awaiting the determination of that suit, but he does not include the plaintiff as a creditor in either the petition or the account and does not make him a party to the proceeding. Section 2680 does not apply because it relates to claims admitted and allowed by the executor. It is only by a rejection of the claim under section 2681 of the Code that a claimant is compelled to either bring an action within three months or submit his claim to the Surrogate's Court in the accounting proceeding. Unless the claim is rejected by the executor the claimant has an absolute right to bring an action in the Supreme Court and its jurisdiction is beyond question. The claim of the defendant that this court is without jurisdiction under sections 2680 and 2681 of the Code, is untenable.

The release given by Evelyn Kienzle to her husband, Christopher Kienzle, and set forth in the 3d paragraph of the separation agreement, provided that the amount paid to the mother was for the support, maintenance and education of the infant during her natural life. Even if it be maintained that by a strict interpretation of the language of this paragraph of the said agreement it also purported to release the father from the obligation to maintain and support the child after the death of the mother, it was clearly beyond the power of the mother to make any binding agreement releasing the father from the support and maintenance of the child after the death of the mother as the law

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cast that responsibility upon the father up to the infant's majority. The provisions of the 4th paragraph of the said separation agreement did not release the father from the support of the child beyond the lifetime of the mother, even though it specifically provides that the wife should retain her dower interest in the premises at No. 101 North Ninth street. The dower interest of Evelyn Kienzle in the said premises ceased with her death on November 9, 1911. The one-third of the purchase price on the sale of the said premises by the father would be equivalent to the value of the said dower and therefore there was no consideration paid by the father under this 4th paragraph of the agreement, and in view of the fact that the property was not sold by the father during his lifetime this part of the agreement was never effectuated. The sum of $4,028 given by the father to the mother on May 31, 1904, for the support of herself and their child, was evidently all expended at the time of the mother's death on November 9, 1911, as it appears in the affidavit of the plaintiff that the mother did not leave sufficient funds to bury her. Hence the support of the infant after the death of the mother could not be paid out of her estate since there was no part of the specific sum of $4,028 given by the father to the mother at the time of making the separation agreement remaining unexpended at her death. The obligation rests upon the father to support his own infant son, even though the infant has an estate of his own. *Goodman* v. *Alexander,* 165 N. Y. 289; *Murphy* v. *Holmes,* 87 App. Div. 369. The separation agreement did not release the father from plaintiff's claim and it is not a bar to this action. Judgment for plaintiff for $2,218 with interest from June 10, 1918, and costs.

Judgment for plaintiff.

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# DALE ENGINEERING COMPANY, Claimant, v. THE STATE OF NEW YORK.

## Claim No. 16176.

(State of New York, Court of Claims, January, 1921.)

**Constitutional law — unconstitutionality of Laws of 1919, chap. 459 — contracts — statutes — jurisdiction — Court of Claims — State Constitution, art. III, §§ 19, 28.**

Chapter 459 of the Laws of 1919, in terms conferring upon the Court of Claims jurisdiction to hear claims of certain highway contractors for losses due to increased cost of labor, material and transportation of material resulting from war conditions, is in violation of section 19 of article III of the State Constitution providing that the legislature shall neither audit nor allow any private claim or account against the state; and it is also in violation of section 28 of the same article providing that the legislature shall not grant any extra compensation to any contractor. (Smith, J., dissents.)

An advertisement for letting of a highway contract was published once between April 6 and April 17, 1917, namely, on April 16, 1917. The date therein advertised for the letting was May 7, 1917. Claimant's bid was dated May 7, 1917, and the contract was executed on May 9, 1917. *Held*, that the contract did not come within the terms of chapter 459 of the Laws of 1919.

The words in section 6 of the act "advertised for letting between April 6, 1917, and April 17, 1917," relate to the advertised date of letting and not to the date of advertising.

CLAIM against the state upon a contract for the improvement of a highway.

Hugh J. O'Brien (T. Harvey Ferris, C. R. Dewey, of counsel), for claimant.

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Arthur E. Rose, third deputy attorney-general, for State of New York.

ACKERSON, P. J. On the 9th day of May, 1917, the above named claimant, the Dale Engineering Company, entered into a contract with the state of New York through the commission of highways, whereby said claimant agreed to improve a county highway in the county of Onondaga known as Jordan-Baldwinsville, part 1, county highway 1506, in accordance with the terms of said contract, and with the plans and specifications accompanying the same for the gross aggregate item prices of $63,995.75. The claimant completed the work under this contract, the highway was accepted by the state, and payment made therefor to the claimant by the state prior to May 7, 1919. The claimant alleges, and there is evidence in the case which tends to prove, that by reason of the declaration of war between the United States of America and the Imperial German government, and the acts of the government of the United States and of the state of New York consequent upon such declaration of war, and the conduct of such war, the cost of performance of the said contract to the claimant, the contractor, for labor, material and the transportation of material was increased in the sum of $27,405.98. It can readily be conceded that owing to the world war above referred to the claimant was confronted with a situation which made it much more difficult and expensive to perform its contract than would otherwise have been the case, but this in and of itself would have created neither a legal nor a moral liability on the part of the state to pay to this claimant any other or different compensation than that mentioned in the contract which was entered into on the 9th day of May, 1917. *Columbus*

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*Ry. Power & Light Co.* v. *City of Columbus*, 249 U. S. 399.

The legislature of this state, however, by chapter 459 of the Laws of 1919, endeavored to relieve to some extent the alleged unfortunate condition in which many contractors with the state found themselves by reason of the increased cost to them of labor, material and transportation caused by the said war after they had entered into their contracts with the state. This act was entitled "An act authorizing the termination of certain highway contracts, conferring jurisdiction upon the court of claims to hear and determine claims and make awards for increased costs incurred in war contracts, and making an appropriation for the completion of unfinished work." It became a law on the 7th day of May, 1919.

By section 1 of this act, "war contracts" were designated as those which were made and executed prior to the 6th day of April, 1917, the date of the declaration of war between the United States of America and the Imperial German government, or those which were entered into after that date on bids submitted to the highway commission before said April sixth. Section 6 of the act extends the benefit of the act to still another class of contracts, namely, those contracts, the actual letting of which took place after the declaration of war on April 6, 1917, but before the introduction of the Draft Act in congress on the 17th day of April, 1917.

It will be seen, therefore, that the whole theory of this legislation was to compensate a contractor for the loss which he had suffered in performing a contract which he had entered into with the state before he had notice that the country was going to be involved in war during the time of the performance of the con-

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tract, or at least before he had notice of the drastic provisions of the Draft Act which would necessarily very much limit his opportunities to get the necessary labor to perform his contract. It was apparently not the intention of the legislature to extend any relief to a contractor who, after war had been declared and after the Draft Act had been introduced in congress, deliberately and with his eyes open, with full knowledge that the country would be in turmoil and that the cost of labor and material and transportation would necessarily greatly increase in value, entered into a contract with the state to perform the necessary labor and furnish the necessary material to build a highway. When a man has notice of those things which, it is evident, must greatly increase the difficulties of his task, he has no one to blame but himself if he gets into trouble. The state, under such circumstances, could not be considered under any kind of an obligation to assist him. The contract in question was not made prior to April 6, 1917; it was not made upon bids submitted prior to April 6, 1917; it was not canceled or abrogated for non-performance, but was fully completed by the claimant as mentioned aforesaid. This contract, therefore, does not come within the provisions of section 1 of chapter 459 of the Laws of 1919. This contract was not let between April 6, 1917, the date of the declaration of war, and April 17, 1917, the date of the introduction of the Draft Act in congress, and, therefore, does not come within the provisions of section 6 of the aforesaid act. But this claimant on the 9th day of May, 1917, more than a month after the declaration of war between the United States of America and the Imperial German government, and more than three weeks after the 17th day of April, 1917, when the aforesaid Draft Act was introduced in

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congress, signed and executed the contract in question with the state by which he obligated himself to furnish the necessary labor and material to build the highway in question. The officers of this claimant were then in full possession of the facts which must have made it plain to them that the performance of their contract would be accompanied with great difficulty and with greatly increased expense on all items of labor, material and transportation, and it was not the intention of the legislature that contractors, who were willing to take those chances and who signed their contracts with full knowledge of those facts, should later on be permitted to come in and make any claim against the state for the increased cost which they ought to have anticipated when they executed their contracts. And, therefore, we say, without any reference to the constitutionality of chapter 459 of the Laws of 1919, that the contract in question does not come within its terms and does not give this court, therefore, any jurisdiction of a claim against the state based upon such a contract.

The particular language upon which the claimant relies, however, and which it contends brings this claim within the benefit of the act, is found in section 6 in these words: "Including contracts advertised for letting between April 6th, 1917, and April 17, 1917, on estimates prepared by the Department of Highways prior to April 6th, 1917." The advertisement which resulted in the letting of this contract to claimant was published once between April 6 and April 17, 1917, viz., on April 16, 1917. The date therein advertised for the letting of the contract was thereby fixed as May 7, 1917. Claimant's bid or proposal, pursuant to such advertisement, was dated May 7, 1917, and the contract bears date May 9, 1917.

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Claimant claims that it is the fact of the publication of the advertisement between April 6 and 17, 1917, which was intended by the legislature to be the test of whether a contract was to be entitled to the benefit of the act under the language above quoted.

I do not agree with that construction of the statute. In my view, the words " between April 6th, 1917 and April 17th, 1917 " relate to the advertised date of letting and not to the date of advertising. This seems to me to be the plain meaning of the language, apart from any other consideration, and is supported by the situation which confronted the legislature when the act in question was pending before it. April 6, 1917, was the date of declaration of war between the United States and the Imperial German government; April 17, 1917, was the date of introduction in the senate of the United States of the Federal Draft Act, of which fact judicial notice is taken. It was the passage and the consequences of the enforcement of the Federal Draft Act which claimant contends so disastrously affected the cost of performance of large construction contracts. No other reason is apparent or assigned for the fixing by the legislature of the period between April 6 and April 17, 1917, than the facts of the declaration of war and the introduction of the Federal Draft Act, and it is probable that that period was fixed with reference to those two events.

The freedom of action of claimant and other contractors was not and could not be affected by the mere fact of advertising a notice of the letting of highway contracts or by the dates of the publication of such advertising. The date advertised for letting, however, was of great importance to the contractor, for on or before that date his proposal must have been duly formulated and filed with the highway commission,

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together with cash or a certified check equal to five per cent of the amount of the proposal as required in the information for bidders and in the public advertisement. If between the date of the declaration of war and the date of the introduction in the senate of the United States of the Federal Draft Act, a contractor had obligated himself by the filing of a proposal accompanied by cash or a certified check, the legislature evidently concluded there was some justice and equity in affording him relief from the consequences of so important a fact as the Draft Act, of which he had and could have had no knowledge at the time of making his proposal, and this, I conclude, is what was intended by the legislature.

If this is the correct construction of the statute, claimant is not within the benefit sought to be conferred by it, for the reason that the advertised date of the letting of this contract was May 7, 1917, on which date claimant's proposal was dated and submitted, and, therefore, I conclude that the court has not jurisdiction of this claim.

The state has not raised this question of jurisdiction nor asked for the dismissal of the claim on this ground. The court, however, feels it to be its duty, being of the opinion that it is without legal jurisdiction, not to assume it.

We now come to the question as to whether this act of the legislature is in violation of the provisions of the Constitution. Section 19 of article III of the Constitution reads as follows: "The legislature shall neither audit nor allow any private claim or account against the State, but may appropriate money to pay such claims as shall have been audited and allowed according to law."

One of my colleagues in his opinion holds that this

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act of the legislature is contrary to the provisions of that portion of the Constitution. I agree with him and concur in the following language which he uses: "In the case at bar the Legislature not only allowed the claim, but directed the Court of Claims to compute the amount found due under such conditions and award judgment, the language of the act being that the Court of Claims shall determine the amount of the difference between the contract and the cost price, and award judgment. The Legislature cannot do indirectly what it cannot do directly."

The act places no burden of responsibility upon the court to determine either the legal liability or the moral obligation of the state. That has been determined by the legislature. All that is left for the court to do is to subtract the amount which would represent the cost of performance of the contract before the war from the amount which represents the actual cost of the performance of the contract and give the claimant an award for such proportion of that as under the terms of the act should be paid by the state. There is absolutely nothing judicial about the act that the court is called upon to perform. It is entirely administrative and clerical. Such being the case, the act is clearly in contravention of section 19 of article III of the Constitution.

We now come, however, to a more serious question than either of those considered above. This claim is one for extra compensation to this contractor. It is conceded to be such by both the state and the claimant. The Constitution, by section 28 of article III, provides as follows: "The legislature shall not, nor shall the common council of any city, nor any board of supervisors, grant any extra compensation to any public officer, servant, agent or contractor."

This is a solemn prohibition by the fundamental

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law of this state, placed there for the protection of the funds of the people of the state, and which is absolutely controlling not only upon the legislature, but upon all the courts of the state. The claimant's counsel seems to think that the difficulty with which he is confronted in this provision of the Constitution can be easily evaded by the contention that it is not the legislature which is granting the extra compensation, but that it is the Court of Claims which is called upon to grant the extra compensation. Again I refer to the language of my colleague, above quoted, wherein he says: "The Legislature cannot do indirectly what it cannot do directly." The Court of Claims of this state is a creature of the legislature. It was instituted by a legislative act. The Constitution prohibits the legislature from awarding extra compensation to a contractor. And it contains no language authorizing the creation of a tribunal to award extra compensation. The provisions of the Constitution are not to be so easily evaded. If they could be, they would be of but little value. Our form of government can continue to exist only by maintaining in its integrity the Constitution upon which it is based. The Constitution can be maintained only by courts and legislatures which have the firmness to resist the assaults made upon it for either personal gain, or the public benefit, or in the cause of pure philanthropy. Such assaults must be overcome whether the motives which inspire them are good or bad.

The state of Wisconsin has a similar clause to this in its Constitution. Section 26 of article IV of the Constitution of the state of Wisconsin declares that the legislature shall never grant any extra compensation to any public contractor after the contract shall be entered into. The Supreme Court of that state, in the case of *Carpenter* v. *State,* 39 Wis. 271, uses lan-



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guage which may well be borne in mind in passing on the present case. The court there said:

"For, in any construction of the statute before us, it assumes to compensate the plaintiff for all work and material under his contract, not at the prices of the contract itself, but at prices ascertained *dehors* the contract and by a rule wholly independent of the contract. Such compensation of a public contractor is prohibited by the Constitution." (p. 282.)

"The exact measure of his right is determined absolutely by his contract, under the constitution; and there exists no where a discretion to vary it." (p. 283.)

"Legislative history points and sanctions the policy of the constitution. It indicates the purpose of the section to save the legislature from the importunity of public contractors and servants, and the treasury from the discretion of the legislature in their favor; to limit contractors with the state, beyond pretense and device, to the precise compensation fixed by their contracts. Under this salutary restraint, no misfortune or rapacity can ever avail in a court of justice, by any artifice of circuity, to change the rule of recovery on a contract with the state. Where there is no fraud or mistake which would authorize a court to avoid or reform any contract, the contract itself must govern. If the compensation be too high, the state must bear the loss; if too low, the contractor must suffer it. The constitution leaves no room to legislature or court for equitable considerations of *quantum meruit*. We cannot say that the statute before us is not equitable; but we do hold that it is not constitutional." (pp. 284–285).

These words of the Wisconsin judge apply here with great force. This statute before us is remedial in its nature, and the end aimed at is undoubtedly justifiable,

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but that it is in defiance of the plain mandates of the Constitution is sufficient to work its condemnation, no matter how laudable its purpose.

That the legislature cannot evade the prohibition placed upon it by the Constitution, by creating a tribunal, and then, without constitutional authority, delegating power to that tribunal to do what it cannot do itself, seems too plain for argument. Section 19 of article III gives the legislature such constitutional authority but section 28 does not. The Court of Appeals of this state, however, has clearly established that principle in a number of cases. Judge Allen in a very learned opinion in the case of *People ex rel. Bolton* v. *Albertson,* 55 N. Y. 55, used this very significant language: "A written Constitution must be interpreted and effect given to it as the paramount law of the land, equally obligatory upon the legislature as upon other departments of government and individual citizens, according to its spirit and the intent of its framers, as indicated by its terms. An act violating the true intent and meaning of the instrument, although not within the letter, is as much within the purview and effect of a prohibition as if within the strict letter; and an act in evasion of the terms of the Constitution, as properly interpreted and understood, and frustrating its general and clearly expressed or necessarily implied purpose, is as clearly void as if in express terms forbidden. A thing within the intent of a Constitution or statutory enactment is, for all purposes, to be regarded as within the words and terms of the law. A written Constitution would be of little avail as a practical and useful restraint upon the different departments of government, if a literal reading only was to be given it, to the exclusion of all necessary implication, and the clear intent ignored, and slight evasions or acts, palpably in evasion of its spirit,

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should be sustained as not repugnant to it. The restraints of the Constitution upon the several departments, among which the various powers of government are distributed, cannot be lessened or diminished by inference and implication; and usurpations of power, or the exercise of power in disregard of the express provision or plain intent of the instrument, as necessarily implied from all its terms, cannot be sustained under the pretence of a liberal or enlightened interpretation, or in deference to the judgment of the legislature, or some supposed necessity, the result of a changed condition of affairs. (1 Kent's Com. 162; *Barto* v. *Himrod,* 4 Seld. 483; *Taylor* v. *Porter,* 4 Hill, 144; *Warner* v. *People,* 2 Den. 272; *People* v. *N. Y. C. R. R. Co.,* 24 N. Y. 485; *Schenectady Observatory* v. *Allen,* 42 id. 404.) "

Judge Vann, in the case of *People ex rel. Burby* v. *Howland,* 155 N. Y. 280, quoted from this opinion of Judge Allen approvingly and in addition said on this subject: " When the main purpose of a statute, or of part of a statute, is to evade the Constitution by effecting indirectly that which cannot be done directly, the act is to that extent void, because it violates the spirit of the fundamental law. Otherwise the Constitution would furnish frail protection to the citizen, for it would be at the mercy of ingenious efforts to circumvent its object and to defeat its commands."

True it is, therefore, that the legislature cannot do indirectly that which it is prohibited from doing directly. Otherwise prohibitions in the Constitution upon the action of the legislature would be powerless to accomplish the object for which they were framed.

If the contention of the claimant is correct that section 28 of article III of the Constitution is a limitation upon the act of the legislature alone, then it is entirely unnecessary and is surplusage, because section 19 of

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article III prohibits the legislature from auditing or allowing any private claim or account against the state whether it be for extra compensation or any other purpose. Section 19 then proceeds to authorize the legislature to appropriate money to pay such claims as shall be audited and allowed according to law. Section 28 of article III, it will be noted, however, contains no provision authorizing the audit and allowance of claims for extra compensation anywhere by anybody. It prohibits the recognition of that class of liabilities against the state, and does not provide any way that extra compensation may be paid to any public contractor. In other words, section 28 of article III is entirely a prohibition, and does not contain, within itself, any recognition that "extra compensation" can under any circumstances be constitutionally granted. This is in accordance with what Judge Rapallo said in his opinion in the case of *Cole* v. *State of New York*, 102 N. Y. 48, where he says, at page 54: "Where the creation of a particular class of liabilities is prohibited by the Constitution, it would of course be an infraction of that instrument to pass *any law* authorizing their enforcement, but in the absence of any such prohibition there is no good reason why the State should be powerless to do justice, or to recognize obligations which are meritorious and honorary and to provide tribunals to pass upon them." (The italics are ours.) In the case of *Cole* v. *State of New York* it appeared that the captain and harbor master of the port of New York and their employees were to be paid out of moneys raised by a tax on the ships in the harbor according to their tonnage. The Supreme Court of the United States held such law to be unconstitutional, and, therefore, the captain and harbor master put in a claim to the state for their salary under and by virtue of chapter 238 of the Laws of 1885 which conferred jurisdiction on the Board of Claims "to hear,

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audit and determine" their claims for such salary. Judge Rapallo further said, in reference to this act: "It grants no extra compensation. It merely gives jurisdiction to hear and determine a claim for reasonable compensation for services rendered in a case where the compensation attempted to be provided by law failed by reason of the invalidity, under the Constitution of the United States, of the provision for such compensation." 102 N. Y. 59.

It seems plain to us, therefore, that the facts concerning the contract in question in this case do not bring it within the terms of chapter 459 of the Laws of 1919, so that even if such act is a valid exercise of legislative authority, this court would have no jurisdiction of this claim in any event. It further appears clear to us, however, as has been well expressed by Judge Morschauser, that this act is in direct violation of section 19 of article III of the Constitution which prohibits the legislature from auditing or allowing any private claim against the state. It is apparent that this is just what it has done by this act. For this reason, therefore, if for no other, the act is unconstitutional, and the claim must be dismissed. But it appears further that the subject upon which the legislature has attempted to act here has been placed beyond its jurisdiction by the Constitution itself. The prohibition in the Constitution, as set forth in section 28 of article III, is not only binding upon the legislature but upon the courts of the state as well. That section places it beyond the power of the legislature or of any tribunal to make an award to any public contractor in this state for extra compensation. That provision of the fundamental law can neither be ignored nor evaded. Without it, public contracting would be reduced to a farce. The public treasury would be the constant object of attack by every public contractor

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who, through misfortune or ignorance, had lost money on his contract. It would also be the constant object of attack by every public contractor whose rapacity for money was strong enough to throttle his integrity and induce him to commit fraud. The state, it is true, may recognize a moral as well as a legal liability. It may authorize the Court of Claims to determine whether the claim of a claimant is a moral obligation against the state, and, if so, to render such an award as shall be just and equitable in the premises, but it has no power either itself to recognize or to authorize the Court of Claims to recognize any claim for extra compensation. The claim before us must, therefore, be dismissed.

SMITH, J. (dissenting in part). I think the decisions of the courts compel the conclusion that, if chapter 459 of the Laws of 1919 is not in contravention of section 28 of article III of the State Constitution, it does not violate section 19 of article III or section 9 of article VIII, for it does not in terms or effect audit or allow any claim against the state, and, if there exists against the state and in favor of the contractors for whose relief the act in question was passed a moral and equitable obligation, though not a legal one, the payment of the money of the state in discharge of such obligation, pursuant to the provisions of an act of the legislature in other respects valid, would not be a gift or gratuity within the meaning of section 9 of article VIII of the Constitution. *Cayuga County* v. *State of New York,* 153 N. Y. 279; *Munro* v. *State of New York,* 223 id. 208.

I conclude also that the act is not in contravention of section 28 of article III of the Constitution. Of course, if contractors are permitted to recover by virtue of its provisions they will have received extra com-

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pensation, because they will have received compensation over and above that fixed by their contracts when the labor and materials were furnished (*Matter of Mahon* v. *Board of Education*, 171 N. Y. 263, 266), but such extra compensation has not been granted by the act, the meaning and effect of which is merely to refer such claims to this court to be heard and examined upon legal evidence to the end that this court may determine whether or not in conscience, equity and justice the state should pay any amount, and if so what amount, on account of the facts alleged in the claim and proven on the trial, the legislature having by the act waived legal defenses to the extent specified in the act.

The section of the Constitution under consideration does not provide that no contractor shall receive any extra compensation, or that the state shall not grant, allow or pay any extra compensation, but merely that the legislature shall not do so. The act contains no language expressly granting any compensation, extra or other, to any contractor, but is a general act declaring a policy of justice and equity to those who under extraordinary war conditions have expended moneys for the benefit of the state in amounts far greater than the state was legally bound to repay, and provides for payment only if and when this court shall by its judgments establish valid claims.

It is urged by the state that the statute by its terms leaves nothing to the court to be judicially determined but commands the court to render the exact judgment directed by its terms. When, however, the act is read and construed in the light of the law as declared in *Munro* v. *State of New York*, 223 N. Y. 208–214, and the word "shall" in the twelfth line of section 6 read as "may" in conformity to the rule there enunciated and applied, it appears that the court is not commanded, but authorized and permitted to render judg-

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ment in such cases, and to fix the amount of the recovery, restricted, however, by the limitations expressed in the act.

Attention has been called to the fact that the act under consideration does not, as did the act construed in the *Munro Case, supra,* in terms confer upon the court jurisdiction to determine, but merely to hear, such claims. This circumstance I regard unimportant. Jurisdiction to hear necessarily implies authority to determine. Hearing without determination would be idle and futile and the legislature cannot be held to have intended an idle ceremony. *American Bank Note Co.* v. *State of New York,* 64 App. Div. 223, 227.

Attention has also been called to the fact that the act construed in the *Munro* case by its terms authorized the court to render judgment for such sum as shall be "just and equitable," whereas in the act under consideration the words "just and equitable" or equivalent words are not used and it is argued that hence the court has not been authorized to determine as to the justice and equity of such claims, but that the legislature itself has determined the justice and equity of the claims in advance, and in favor of claimants, leaving to the court only the duty of computing the amount of the judgment to be rendered. I do not so read the statute.

Jurisdiction to hear and determine includes power to determine and decide every question necessarily involved in the case being heard. The words "The Court of Claims shall (may) determine the increased cost * * * and render judgment against the state for the amount so determined as chargeable to the state" confer power and authority to allow or reject claims in whole or in part and in considering whether they are to be allowed, to take into consideration principles of equity and common justice, disregarding

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purely legal defenses to the extent permitted by the act. *Cole* v. *State of New York,* 102 N. Y. 48, 52; *Munro* v. *State of New York,* 223 id. 208, 213.

There is abundant authority to support the power of the legislature by appropriate enactments to recognize the moral and equitable obligations of the state to the extent of referring them to this court for examination and determination and allowance if the facts shall establish a moral and equitable ground for recovery, though the legislature is forbidden by the Constitution to itself audit and allow such claims. *Board of Supervisors of County of Cayuga* v. *State of New York,* 153 N. Y. 279; *Cole* v. *State of New York,* 102 id. 46; *O'Hara* v. *State of New York,* 112 id. 146; *Wheeler* v. *State of New York,* 190 id. 406; *Lehigh Valley R. R. Co.* v. *Canal Board,* 204 id. 471; *Munro* v. *State of New York,* 223 id. 208.

I have not overlooked *Matter of Mahon* v. *Board of Education,* 171 N. Y. 263. The statute there considered (Laws of 1900, chap. 725) made no provision for the hearing and determination of the claims of the retired teachers to a pension, but the right to the pension and the amount thereof were determined by the direct action of the legislature; hence the act was held to be in contravention of section 28 of article III of the Constituton.

However, I concur in the opinion of Presiding Judge Ackerson that this court is without jurisdiction to make an award in claimant's favor upon this claim for the reason that chapter 459 of the Laws of 1919 does not apply to claimant's contract nor to this claim, and, therefore, that the claim should be dismissed.

MORSCHAUSER, J. (concurring). The claim herein is made by a contractor who has had a contract for the construction of a public highway with the state to build a state road. The claim is filed under chapter

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459, Laws of 1919, commonly known as the Knight Act. Section 6 confers jurisdiction upon the court, and reads as follows:

"§ 6. Jurisdiction is hereby conferred upon the court of claims to hear all claims for alleged increase in the cost of labor, materials or transportation of materials incurred after April sixth, nineteen hundred and seventeen, in the doing and performance of war contracts which have been completed, accepted and for which final payment has been made, including contracts advertised for letting between April sixth, nineteen hundred and seventeen, and April seventeenth, nineteen hundred and seventeen, on estimates prepared by the department of highways prior to April sixth, nineteen hundred and seventeen, and also of any war contract terminated under the provisions of this act. The court of claims shall determine the increased cost, whether the whole or a part, which is properly chargeable against the state and the portion of such increased cost, if any, which may be paid by a subdivision or subdivisions of the state as hereinafter provided on the basis on which the state and the subdivisions of the state were obligated to pay for the work done under the contract and render judgment against the state for the amount so determined as chargeable to the state, which judgment shall be paid as other judgments against the state are paid. No judgment shall be rendered, however, for an amount greater than thirty-five per centum of the contract price of labor, materials and the transportation of materials furnished or supplied during the year nineteen hundred and seventeen, nor greater than fifty per centum of the contract price of labor, materials and transportation of materials furnished or supplied during the year nineteen hundred and eighteen. No claim for relief under this section shall be main-

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tained against the state unless the claimant shall file his claim within six months after his right of action shall accrue under the provisions of this act. Any subdivision of the state is authorized and empowered to raise by taxation or by an issue of its obligations such an amount as may have been found by the court of claims to be the proportion which said subdivision may pay for the increased cost as so determined, and to pay said amount to the contractor entitled to receive the same."

Among other defenses made by the state, it challenges the constitutionality of the Knight Act and asserts that the same is unconstitutional under the provisions of section 19, article III, and section 28 of article III of the New York State Constitution. Section 19, article III, reads as follows: "The legislature shall neither audit nor allow any private claim or account against the State, but may appropriate money to pay such claims as shall have been audited and allowed according to law."

Section 28, article III, reads as follows: "The legislature shall not, nor shall the common council of any city, nor any board of supervisors, grant any extra compensation to any public officer, servant, agent or contractor."

Both section 19 and section 28 of article III were recommended by the Constitutional Convention in 1867 and were adopted and became a part of the provisions of the Constitution in 1874. In addition to these amendments of the Constitution, sections 6 and 9 of article VII and sections 9 and 10 of article VIII were all under discussion by the Constitutional Convention of 1867 and were all adopted in 1874, and in that year became part of the Constitution of the state of New York. All of these sections were amendments to the Constitution and were adopted in 1874 to remedy the

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many evils of special legislation, which had grown so extensive as to become a public scandal. Prior to the adoption of these amendments the power of the legislature was not restricted, so that it could pass private bills (or change the terms of a contract) or increase the pay of contractors, increase salaries and do many things that these amendments were intended to prohibit, and before these amendments special legislation became subject to great abuses, which the various amendments above named to the Constitution were intended to remedy. After the adoption of these amendments to the Constitution and after they became a part of the Constitution of the state there arose many instances in which the state, recognizing its moral obligation, where in its judgment justice and right demanded it, by enactments through the legislature conferred jurisdiction on the Board of Claims, and afterwards the Court of Claims, directing them to disregard legal defenses and award judgment against the state, if the court found that the claim was founded on equity and justice, although the claims were not such as could have been enforced in a court of law if the state had not been immune from suit. Under such circumstances many enabling acts have been passed by the legislature; and the several amendments of 1874, above named, have been the subject of judicial construction, arising out of claims presented under such special legislation. Almost without exception the courts have held in such cases such enabling acts to be constitutional and not in violation of the provisions of the various amendments, if the claim and demand against the state was one founded on justice and equity. *Munro* v. *State of New York*, 223 N. Y. 208; *Lehigh Valley R. R. Co.* v. *Canal Board*, 204 id. 471; *Trustees Exempt Firemen's Benev. Fund* v. *Roome*, 93 id. 313; *Wheeler* v. *State of New York*, 190

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id. 406; *Matter of Boston & Albany R. R. Co.*, 64 App. Div. 257; 170 N. Y. 619; *Oswego & Syracuse R. R. Co.* v. *State of New York*, 186 id. 384; affd., 226 N. Y. 351; *Cole* v. *State of New York*, 102 id. 48.

But in no instance where the enabling act was passed in aid of any one who rendered services to the state or who was entitled to recover from the state did the legislature assume to determine the question of the equity or justice of such a claim, but submitted it to a tribunal to *hear, audit and determine*, and usually conferred jurisdiction upon the Court of Claims and invested such tribunal with judicial powers to determine the equities and justice of a claim so presented, and permitted it to decide such questions. The state, recognizing its moral obligation, could at all times do justice even though it had a legal defense to claims presented, and the courts have uniformly held that under such circumstances the amendments to the Constitution of 1874 did not prevent the state through its legislature from enacting laws whereby these claims could be submitted to some tribunal for determination. The legislature itself could not make such determination, and, therefore, jurisdiction to make such determination and hear the claim and audit and determine the same was usually referred to its tribunal known as the Court of Claims, created for that purpose. The legislature could not in any orderly way, such as the taking of testimony and the observation of legal rules governing evidence, determine these questions. By referring it to the Court of Claims there was an orderly way of determining it upon evidence, and the right to appeal and review was provided by the Code. And where this was done, the courts have uniformly held that such enabling act conferring such jurisdiction was not in violation of the constitutional provisions above named.

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At the time of the declaration of war of the United States with the Imperial German government, the state of New York was under contract with many contractors to build or repair state highways. This war created a great demand from the ranks of labor for men and great increase in the costs of labor and material and in the costs of transportation; industries were converted into ammunition factories and all labor was either used in the manufacture of ammunition and other articles used in the war or the laboring man was converted into a soldier; railroads were busily engaged in transporting war necessities, with the result that the costs of all labor and material were greatly increased. The war and these conditions were not contemplated at the time the contractors entered into the contract for the improvement or construction of highways, and it certainly never was intended by either contracting party to be one of the hazards usually encountered in the carrying out of contracts; and the contractor when making his bid could not be expected to anticipate such a condition; and the costs of material, labor and transportation after the war reached such a high mark that to compel the contractor to complete his contract would mean in many cases absolute bankruptcy for him.

While it is a well-settled rule of law that a person may be relieved from an obligation of his contract when it becomes impossible of performance or when such performance has become impossible on his part by some superior force without his fault, it was nevertheless held in *Columbus Railway, Power & L. Co.* v. *Columbus,* 249 U. S. 399, that the high cost of labor and the increased costs of material and transportation brought about by the World War, did not make a contract impossible of performance and was not such superior force as to prevent its performance.

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Justice Day in writing the opinion for the court, among other things, says: "It certainly was not intended to question the principle, frequently declared in decisions of this court, that if a party charge himself with an obligation possible to be performed, he must abide by it unless performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties will not excuse performance. Where the parties have made no provision for a dispensation, the terms of the contract must prevail. * * * The latest utterance of this court upon the subject is found in *Day* v. *United States,* 245 U. S. 159, in which it was said: 'One who makes a contract never can be absolutely certain that he will be able to perform it when the time comes, and the very essence of it is that he takes the risk within the limits of his undertaking. * * *'"

In that case one of the contracting parties sought to enforce the contract against the other party, and the effect of this decision was that the World War and the condition created by it did not excuse either contracting party from fulfilling the obligations of his contract.

In the case on trial before this court, while the question arose between the contracting parties, one of the contracting parties, namely, the state of New York, by legislative enactment did relieve the other party from carrying out his contract and relieved him from his obligations thereunder which were brought about by the World War, as chapter 585 of the Laws of 1918, commonly known as the Walters Act, permitted the state upon consent of the contractor to terminate such contracts, and if the state had not by legislative enactment waived the performance of the contract, under the decision in *Columbus Railway, Power & L. Co.* v. *Columbus, supra,* the conditions created by the World

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War would not have permitted the contractor to abandon his contract.

We think the legislature had the power to allow any contractor who had a contract with the state, with the consent of the contractor to cancel the same. As was said in *People ex rel. Williams* v. *Dayton*, 55 N. Y. 374: "No constitutional provision can prevent a failure, on the part of the contractor, to perform his contract nor his abandonment of it; and it is conceded that the legislature may cancel or authorize contracts to be canceled." And we think that the legislature had such power if assented to by the contractor, and that the legislature could go further and confer upon the Court of Claims jurisdiction to *hear, audit and determine* the equities of the claim and, if the state should as a moral obligation by reason of the World War pay the contractor the difference between the stipulated price under the contract and the increased cost, allow the Court of Claims to do so. This the legislature attempted to do by the enactment of chapter 459 of the Laws of 1919, commonly known as the Knight Act. Had the legislature done so we do not think that the provisions of the Constitution named would have been violated. But by the Knight Act the legislature did not confer jurisdiction upon the Court of Claims to *hear, audit and determine* the claim. It simply directed that the Court of Claims shall determine the difference in the cost and then commanded the Court of Claims to award judgment for such sum in favor of the contractor. While it states in the act that the Court of Claims shall *hear* the claim, it nowhere confers any jurisdiction to *audit* and *determine* the same, but simply directs that the Court of Claims shall make a computation of the difference in the cost and determine the amount thereof and then award judgment against the state and in favor of the



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contractor for the amount so ascertained. The legislature by the Knight Act assumed to decide the equities and the moral obligation of the state, and left nothing for the Court of Claims to do except to compute the amount. This, we think, is precisely what the amendments to the Constitution intended to prevent the legislature from doing. While the state was ready to do equity and observe its moral obligation, the decisions hold that the question as to whether a claim presented against the state should in good conscience be paid and whether there was any moral obligation upon the part of the state in equity and justice to pay the same although the state may have had some legal defense, should always be submitted to a constituted tribunal with judicial functions so that the matter could be judicially determined and properly reviewed upon appeal. This principle of law is clearly stated by Judge Rapallo in *Cole* v. *State of New York*, 102 N. Y. 51. In this case the claimant, while acting as a captain and harbor master of the port of New York, rendered certain services to the state of New York, which he was authorized to do by chapter 436 of the Laws of 1860 and it was afterwards determined that he could not be legally paid for such services. He having rendered services to the state, the legislature by chapter 238, Laws of 1885, conferred jurisdiction upon the Board of Claims to *hear, audit* and *determine* such claim. The act was challenged as being unconstitutional and in violation of section 19, article III, of the New York State Constitution. Judge Rapallo, writing the opinion for the court, says:

"It is apparent that the act does not come within the prohibition against the *auditing* by the legislature of any private claim. The act does not purport to audit the claims. This the legislature could not do, however just the claim, or however legal it might be

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if preferred against an individual. The Constitution prohibits the legislature from exercising the power of *itself* auditing claims, which is in its nature judicial, but provides for the payment of claims which shall have been audited or allowed according to law; thus recognizing the power of the legislature to provide by law for the auditing and allowing by some appropriate tribunal of claims against the State.

"It is contended, however, that the act does come within the prohibition against *allowing* claims against the State.

"It must be observed that the act of 1885 does not even assume to *allow* these claims. It simply submits them to the arbitrament of the board of claims, a judicial body established for the purpose of passing upon claims against the State. It gives jurisdiction to that tribunal to *hear* and *determine* those claims, but does not dictate how it shall decide upon them. The only limitation upon the power of the board to decide is, that it shall confine itself to a reasonable compensation for services performed and expenses incurred during the year specified. Under the authority conferred by the act, that tribunal, if it deemed the claims unjust, might have rejected them in toto. The power to hear and *determine* includes power to reject as well as to allow. Construing the constitutional restriction literally, it was not violated by giving to the board jurisdiction to hear and determine. The enactment was consequently purely legislative and in no sense an exercise of judicial power.

"It is contended, however, that the enactment was violative of the spirit and intent of the constitutional prohibition, if not of its letter. That it was intended not merely to prevent the legislature from itself acting judicially in passing upon private claims, but from passing any law under which a private claim could

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be recognized by or established against the State, however just and equitable it might be, unless it was founded on a legal liability which could be enforced by the courts of justice against an individual or a corporation. We find no such restriction upon the legislative power in the State Constitution. The act establishing the board of claims (Laws of 1883, chap. 205, amended by Laws of 1884, chap. 60) confers upon the board jurisdiction to hear, audit and determine all private claims which shall have accrued within two years, except such as are barred by existing statutes. But that restriction was imposed by the legislature and is subject to modification by it.

"The statute of limitations and other legal defenses are, under the general law, available to the State as against a private claim preferred to the board of claims, and as a general rule it has been considered that the authority of the board is confined to the allowance of *legal* claims. But can it be maintaned that it would be beyond the power of the legislature, in special cases, where in its judgment justice and right demanded it, to give power to the board of claims to disregard defenses strictly legal? We are unable to find in the Constitution anything which deprives the legislature of the power of giving to the board of claims, or any other proper tribunal, jurisdiction to hear and determine claims against the State which are founded in right and justice, solely for the reason that they could not be enforced against an individual in the courts. * * *

"Where the creation of a particular class of liabilities is prohibited by the Constitution, it would of course be an infraction of that instrument to pass any law authorizing their enforcement, but in the absence of any such prohibition there is no good reason why the State should be powerless to do justice, or to recognize

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obligations which are meritorious and honorary and to provide tribunals to pass upon them. The legislative power is sufficient, even as between individuals, to afford new remedies and to create liabilities not before existing, where they are based upon general principles of justice.

"As a general rule money expended or services rendered by one individual for the benefit of another, but without his request or authority, do not create a legal liability on the part of the person benefited to make compensation. But a law which should provide that in every such case, if the party benefited ratifies the acts of the other, and accepts the benefits, he should be liable, would be free from objection, so far, at all events, as it should apply to future transactions. Where the legislature is dealing with the imperfect obligation arising from such a state of facts, it seems to us that it does not transcend its power by passing a law affording a remedy even in respect to past transactions, where the State adopts the acts and is the party to make the compensation, and no rights of individuals, which are protected by the Constitution, are invaded."

In the case at bar the legislature not only allowed the claim but directed the Court of Claims to compute the amount found due under such conditions and award judgment, the language of the act being that the Court of Claims *shall* determine the amount of the difference between the contract and cost price and award judgment. The legislature cannot do indirectly what it cannot do directly. In the case of *Munro* v. *State of New York*, 223 N. Y. 208, where the claimant had been injured while in the employ of the state by reason of the acts of an insane person at a state hospital (although the state was not legally liable) yet it was held that the enabling act was constitutional and

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not in violation of the constitutional principles above named. In that case, after reciting the facts, the legislature declared that such facts shall constitute a legal and valid claim against the state and the court *shall award and render judgment for the claimant;* and it was there held, Judge Crane writing the opinion, that the word "shall" was not intended to nullify the power of the court to hear, audit and determine or make it compulsory to award damage (the clear meaning of the intent of the legislature was to confer authority and power upon the Court of Claims and not to direct or control its action). This was the reason, and the court says: "It might appear at first reading as if the legislature had allowed Munro's claim and merely left it to the Court of Claims to fix the amount of damages, but when we read more closely and apply the rules of statutory construction this impression vanishes. 'The spirit, not the letter, must control,' said Miller, J., in *Matter of Jensen* v. *Southern Pacific Co.* (215 N. Y. 514, 522) where 'may be' was held to mean 'shall be.' By the first clause of the act the Court of Claims 'is authorized to hear, audit and determine the claim of John I. Munro.' It is then provided, 'if the court finds such injuries were so sustained, damages therefor shall constitute a legal and valid claim against the state, and the court shall award to and render judgment for the claimant for such sum as shall be just and equitable.' The use of the word 'shall' in these latter phrases was not intended to nullify the power of the court to hear, audit and *determine* or make it compulsory to award damages."

The word "shall" in the enabling act in the *Munro* case was held by Judge Crane to mean "may" for the reason that the word "shall" in that case, as Judge Crane said, did not intend to nullify the power

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of the court to hear or to determine or make it compulsory to award damages. "The clear intent of the legislature was to confer authority and power upon the Court of Claims and not to direct or control its action." In the enabling act in the *Munro* case the court was not directed to award judgment, but the statute merely directed the court in that case to render judgment for the claimant for such sum as shall be just and equitable.

The enabling act in that case still left the determination of the questions to the Court of Claims. We think that the act conferring jurisdiction upon this court, chapter 459 of the Laws of 1919, was clearly in violation of the provisions of section 19, article III, and section 28 of article III. It not only audited and allowed a private claim against the state, but gave extra compensation to a contractor in violation of section 28 of article III. "Extra" is defined by Webster—"Beyond or greater than what is due," and this is commonly understood to be the meaning of the word "extra;" and when the Constitution provided there should be no extra compensation it certainly was intended by the framers of the Constitution that no pay beyond that which is named in the contract should be allowed a contractor. Extra compensation was precisely what the legislature did grant the contractor, by virtue of chapter 459 of the Laws of 1919; and while under the decisions if the state was under a moral obligation so to do and it was founded on justice and equity, the legislature could so do, still the legislature by virtue of these amendments of the Constitution had no authority to determine that question itself, but was obligated to confer jurisdiction upon some judicial tribunal, where the equities could be determined. If this act had conferred jurisdiction upon some duly constituted judi-

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cial tribunal to *hear, audit and determine* the equities and justice of the claim, we think it would not have been in violation of the provisions of the Constitution of this state, above named; but as the act did not do this but allowed extra compensation to a contractor and only authorized the Court of Claims to hear the claim and then directed the court to award judgment for an amount to be computed, we think was in violation of the provisions of the Constitution. We think that the Knight Act allowed extra compensation to a contractor and merely left it to the Court of Claims to fix the amount, and this amount was to be fixed by ascertaining the difference between the amount named in the contract and the increased cost brought about by conditions created by the World War, so that the act substantially directed the Court of Claims to award judgment. It left nothing for the Court of Claims to do. It did not call upon the Court of Claims to exercise any judicial functions but the legislature assumed to allow extra compensation and through the Court of Claims compel the state treasurer to pay this contractor beyond the amount stipulated in the contract. The act might just as well have directed some person to have computed the amount and upon such computation directed the state treasurer to pay it. This was precisely what the Constitution as amended in 1874 intended to prevent. We must, therefore, conclude that the act is unconstitutional.

Claim dismissed.

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# RICHARD J. HEINEMANN, Claimant, v. THE STATE OF NEW YORK.

## Claim No. 16661.

(State of New York, Court of Claims, January, 1921.)

**Liquor Tax Law, § 7. as amended in 1918 — powers of state commissioner of excise — when claim for salary dismissed — statutes — State Finance Law, § 35.**

Under section 7 of the Liquor Tax Law, as amended in 1918, the state commissioner of excise has power to appoint special agents at an annual salary, but as the statute fixes no term of office, the commissioner of excise may in his discretion discharge or remove a special agent at any time.

Where the state commissioner of excise, as in duty bound by section 35 of the State Finance Law, notifies a special agent appointed by him under section 7 of the Liquor Tax Law, that the legislature has made no appropriation for special agents, beyond March 31, 1920, such action of the commissioner is a notification to the special agent, who was serving in continuance of a probationary appointment made in 1915, that his services would be no longer required, and his claim for salary for the month of April, 1920, must be dismissed.

*O'Neil* v. *State of New York*, 223 N. Y. 40, distinguished.

CLAIM for salary as special agent of the state commission of excise.

Edward J. Halter, for claimant.

A. A. Armitage, deputy attorney-general, for state of New York.

MORSCHAUSER, J. The claimant presents a claim against the state to recover for salary as special agent of the state commission of excise for a period

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beginning April 1, 1920, and ending April 30, 1920, amounting for the month, for which he makes a claim, to the sum of $150. He alleges that he was appointed a special agent pursuant to section 7, chapter 39 of the Laws of 1909, constituting chapter 34 of the Consolidated Laws known as the Liquor Tax Law. The claimant was appointed special agent by the state commissioner of excise to take effect May 11, 1915, at a salary of $1,000 per annum. The rules of the civil service commission placed the special agents of the excise department in the competitive class; and the claimant was appointed from a civil service list. The appointment, pursuant to the civil service rules, was for a probationary term of three months. There was no further appointment of the claimant, and he continued to act as special agent under the original appointment until March 31, 1920. At the time of the claimant's appointment an oath of office was unnecessary but during the World War the legislature by chapter 574 of the Laws of 1917 required all persons employed by the state, and its civil divisions, to take and file an oath of office. On the 9th day of May, 1917, the claimant took such oath and filed the same June 15, 1917, in the office of the secretary of state. The claimant also filed the bond required by law. The claimant under the Excise Law was entitled for the first year to an annual salary of $1,000. After he had served one year from the date of his appointment he was entitled to an annual salary of $1,250, and after he had served two years he was entitled to an annual salary of $1,500. The law fixing the salary was amended by chapter 469 of the Laws of 1918, which provides that special agents in the excise department for the first year should receive $1,000 per annum, the second year $1,250 per annum and the third year $1,500 per annum, and further provided that after

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such special agents had served three years they should receive an annual salary of $1,800.

By chapter 177 of the Laws of 1919, the legislature in its appropriation bill made appropriations for special agents in the excise department from July 1, 1919, to March 31, 1920, and limited the number of special agents in the excise department to forty-one, thirty-nine of whom were to receive a salary of $1,350 for nine months, and two were to receive a salary of $1,125 for nine months. There was no appropriation made for such special agents beyond March 31, 1920. Under the act creating an excise department the number of special agents to be appointed was sixty. On March tenth, while the claimant was performing the duties of a special agent the state commissioner of excise wrote to the claimant a letter which reads as follows: "I hereby notify you that no appropriation was made for your salary as special agent or for that of any other special agents in the department after March 31, 1920."

On March 11, 1920, the claimant, in answer to the communication of the commissioner of excise, wrote a letter which was received by the commissioner which reads as follows: "I am receipt of your letter notifying me of the failure of the appropriation for salaries of special agents after March 31, 1920. Replying thereto, I wish to make the following statement of my position: I do not consider that this terminates my service in the department. I will at all times hold myself in readiness to perform all the duties imposed upon me by the liquor tax law, and to obey all instructions and orders issued by you to me in connection therewith. My address until further notice will be 931 Madison Avenue, Albany."

The commissioner then wrote a letter to the claimant which the claimant received which reads as fol-

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lows: "The State Department of Excise will probably need your services as a witness from time to time in the various actions and proceedings now pending. Will you hold yourself in readiness to attend upon the trial of such actions and proceedings upon request by letter or telegram where your attendance as a witness may be needed, upon the payment of your necessary expenses for such attendance upon the same basis as they have been heretofore allowed by this office and the State Comptroller, including carfare and hotel bills and at a per diem compensation of $10; such expenses and per diem compensation will be paid in the usual way upon your presenting a verified expense account for the same. This letter is sent to you for the reason that no appropriation has been made providing for the payment of your salary as special agent after March 31, 1920, and to provide a way for obtaining your attendance as a witness in such actions and proceedings without subpoenaing you."

The claimant replied to this letter as follows: "Replying to your communication of March 20th, 1920, permit me to state that I will be in readiness to attend the trial of any action or proceeding upon request by letter or a telegram as per diem compensation allowed. In doing so, however, I do not waive any rights that will prejudice any future action contemplated by me."

The claimant ceased to perform any services as special agent after March 30, 1920. On April 1, 1920, the claimant entered the employ of the Ætna Life Insurance Company at a salary of $2,000 a year. On June 21, 1920, claimant filed his claim against the state with the Court of Claims for the sum of $150, claiming that amount due him for the month of April, 1920, by virtue of his appointment as special agent under the Liquor Tax Law, the claimant's contention being that

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he was appointed by the state at a fixed salary and for a definite term and was, therefore, entitled to receive pay for the month of April, 1920. He also asserts that he was neither removed, discharged nor suspended from his position as special agent.

Under section 7 of the Liquor Tax Law as originally enacted by chapter 39 of the Laws of 1909, and as amended by chapter 569 of the Laws of 1918, the commissioner of excise was given power to appoint special agents at an annual salary; and under the provisions of this law special agents appointed could be removed by the commissioner at any time, and such commissioner was given the power to appoint their successors. There is nothing in the statute that fixes the term of office of a special agent. The statute only fixes an annual salary. As such agents under this statute were not employed or appointed for any definite time and no term of office was fixed they could be discharged or removed at any time by the commissioner of excise. The hiring or employing of a person at a certain salary per annum has been held not to be an employment for any particular or definite term. *Martin* v. *New York Life Ins. Co.*, 148 N. Y. 117; *Watson* v. *Gugino*, 204 id. 535.

There is nothing in the law creating the office of special agent that gives the commissioner power to appoint such special agents for any definite term, and there is nothing in the statute fixing a definite term for such special agents, and in the Excise Law as originally enacted, and the amendments thereto, the commissioner of excise at all times was given the power to remove such special agents in his discretion.

Under chapter 177 of the Laws of 1919, which was the appropriations made by the legislature for the year beginning the 1st of July, 1919, the legislature limited the appropriation for special agents in the

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excise department to March 31, 1920. Under this appropriation bill the comptroller was not permitted to audit any claim presented by the claimant for April, 1919. The State Finance Law provides as follows: "A state officer, employee, board, department or commission shall not contract indebtedness on behalf of the state, nor assume to bind the state, in an amount in excess of money appropriated or otherwise lawfully available." Laws of 1909, chap. 58, § 35.

When the legislature made an appropriation for the payment of special agents under the Liquor Tax Law and limited the appropriation for services for nine months, the commissioner could not incur any further expense even if he chose so to do by retaining the claimant. When the nine months had expired, in which the legislature had made appropriations for special agents, the commissioner wrote the claimant that there was no appropriation by the legislature beyond March 31, 1920, for special agents. This was in effect a notification that the commissioner did not any longer require the service of the claimant and a further notification that he could not accept any services for the state by the claimant. The claimant must have known that under the State Finance Law the commissioner was prohibited from incurring any further expense or continuing the employment of the claimant, and, therefore, the notification that there was no appropriation was in effect a discharge of the claimant by the commissioner. We do not think that the claimant was appointed for any definite term, and under section 7, chapter 39 of the Laws of 1909 it was within the power of the commissioner to discharge the claimant at any time.

Where an officer whose term is definite and fixed has been prevented for a time through no fault of his from performing the duties of his office, and has

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during that time earned wages in another and different employment, he cannot be compelled in an action to recover his unpaid salary to deduct the amount so earned for the reason that the salary belongs to him as an incident in his office so long as he holds it, and when improperly withheld he may sue for it and recover it, and when he does so he is entitled to the full amount, not by force of any contract but because the law attaches the salary to the office, and there is no question of breach of contract or resultant damage out of which the doctrine evoked has grown. *Fitzsimmons* v. *City of Brooklyn*, 102 N. Y. 538; *Young* v. *City of Rochester*, 73 App. Div. 81. But this rule is not applicable in this case for the reason that the claimant was not appointed for any definite term and for the further reason that the act creating the power of the commissioner to appoint the claimant also gave the commissioner power to discharge the claimant at any time.

After the legislature had limited the appropriations for special agents to March 31, 1920, it was the duty of the commissioner of excise under the Finance Law to notify the claimant and the commissioner could no longer accept or continue his services or incur any further expense by retaining the claimant.

The claimant urges upon us the case of *O'Neil* v. *State of New York*, 223 N. Y. 40. This case is easily distinguishable from the claimant's case. In the *O'Neil* case the claimant was appointed a commissioner as a member of the state athletic commission, pursuant to chapter 779 of the Laws of 1911. This statute fixed the term of office at five years and in that case O'Neil was appointed for a term of five years and in the statute giving the governor power to appoint him there was no provision giving the governor power to discharge such appointee. As the legislature failed to

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make an appropriation for O'Neil's salary he filed his claim with the Court of Claims and it was held that he was entitled to recover his salary because the law fixing his term of office and his appointment was for a definite term which had not expired.

The commissioner of excise in this case, in view of the appropriation by the legislature for the claimant's salary being limited to March 1, 1920, was obliged to notify the claimant of the fact that no further appropriation was made and he must in view of section 35 of the Finance Law have understood that this was a notification that his services would no longer be required.

The claim of the claimant must, therefore, be dismissed.

ACKERSON, P. J., concurs.

Claim dismissed.

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FRANK BEST, as Administrator of WILLIAM BEST, Claimant, *v.* STATE OF NEW YORK.

Claim No. 16537.

(State of New York, Court of Claims, January, 1921.)

**Highways — immunity of state — when state not negligent in care of highways — claims — Highway Law, § 176.**

The state is always immune from actions or liability unless it expressly waives such immunity and assumes liability. (P. 278.)

By section 176 of the Highway Law (Laws of 1909, chap. 30, as amended) the state assumes liability for defects in its highways where the state highway is under the patrol system. (Id.)

It is not negligence on the part of the state to place gravel upon the dirt part of a state highway, worn away from time to time, and bring it up to the level of the macadam surface part of the road. (P. 279.)

While claimant's intestate, a boy about seven years of age, was riding as a passenger on an auto bus which was being driven

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along a state highway operated under the patrol system, the steering gear of the bus broke and the driver could neither guide nor control it. He applied both the front and emergency brakes but the momentum carried the bus along for some distance, and while so moving the left front wheel ran on the hard surface of the macadam road and the right wheel ran on the loose gravel part of the road, thus deflecting the course of the bus toward the north edge of the road. When the bus got to the edge of the road it had almost stopped, but still had momentum sufficient to bring the right front wheel over the edge of the road when the bus overturned, dropped to the bottom of the embankment in the field adjoining and in going down it struck the top of the retaining wall and tore some of it out. Claimant's intestate was caught between the top of the seat in the bus and the bottom of the embankment and was so injured that within a short time he died. Just before the accident the state had placed on each side of the macadam part of the road at the place of the accident several inches in thickness of loose gravel and had brought the sides up to a level with the macadam part of the road and left the dirt and gravel to become hard and packed by the use of the public, but at the time of the accident the gravel had not become hard or packed. *Held,* that the conditions as they existed at the time of the accident were not "defects" within the meaning of section 176 of the Highway Law and the claim herein will be dismissed on the ground that the state was not negligent in failing to anticipate the emergency that occurred at the time of the accident.

CLAIM for personal injuries.

Daniel V. McNamee and R. M. Herzberg, for claimant.

Edward M. Brown, deputy attorney-general, for State of New York.

MORSCHAUSER, J. The claimant presents a claim against the state alleging that his intestate was injured on June 15, 1919, through the negligence of the state, from which injuries the intestate died, and which negligence the claimant asserts was caused by certain defects in a state highway while under the patrol

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system and which defect was the cause of the claimant's intestate being injured.

On the trial both claimant and the state consented that the court view the location where the accident occurred, and further consented that such view should be had in the presence of the attorneys for the claimant and in the presence of the engineers of the state. Pursuant to such consent and under the provisions of section 268 of the Code of Civil Procedure the court viewed the highway and the land surrounding and the conditions existing at the place of the accident.

The intestate was a boy of about seven years of age living with his parents at Philmont, N. Y. On the day in question he was a passenger on an auto bus which carried passengers between Hudson and Philmont, Columbia county, N. Y. At that time the bus was traveling from Hudson to Philmont going in a westerly direction, and while approaching Mellenville, and a few feet east of the place of the accident the steering gear of the bus broke and the driver of the bus could not guide or control it.

At this point the highway was eighteen feet in width, substantially straight and level, running east and west. Further west from the place of the accident there was a slight curve towards the north, the beginning of which was over one hundred feet westerly from the place where the accident occurred. At the beginning of this curve the land adjoining on each side of the road was substantially level with the road, and up to that point the road was straight and level. The highway had fourteen feet of macadam surface, and on each side of this macadam surface there was four feet of dirt surface. The dirt part of the road wore away from use, and to prevent an abrupt shoulder and to make it safe for travel the state from time to time placed gravel on the dirt road to bring the surface of

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the dirt part of the road level with the macadam part. Just before the accident the state placed on each side of the macadam part of the road at the place of the accident several inches in thickness of loose gravel and brought it up to a level with the macadam part of the road and left the dirt and gravel to become hard and packed by the use of the public. At the time of the accident the gravel had not become hard or packed at this place. For several hundred feet the surface of the land on the south was about level with the highway, but on the north for the same distance there was an abrupt fall or decline of about twelve feet from the edge and top of the dirt roadway to the bottom of the embankment. There was at the time no guard rail or other barrier placed at the edge of the highway on the north where the embankment existed. From the place of the accident along the bottom of the embankment and running parallel with the road the land sloped upward for about one hundred feet in each direction until it reached the level surface of the land adjoining the highway both east and west of the place where the accident occurred. Before any road was built at this point there was a large basin, and originally a country road was built across the north end of this basin about four feet below the surface of the present state road. From the east and west sides of the edge of the basin as the road was orginally built there was a descent each way toward the place of the accident so that the surface of the old road on its north side was about three feet below the level, and on the south side about nine feet above the level, of the surface of the land adjoining the roadway. When the old road was built it was done by filling up the hollow between the east and west edges of this basin, and on the north side of this fill was placed a retaining wall made of field stone, dry laid, running parallel with the

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road for about 100 feet, commencing about thirty feet east and continuing to about seventy feet west of the place where the accident occurred. When the state road was constructed the north line or edge of the state road was placed about three feet southerly from the north edge of the old road, and three feet from the edge of this stone wall, and another fill was made raising the road about four feet so as to make the state road substantially straight and level at this point.

When the steering gear of the bus broke the driver of the bus lost control of it so that it could not be guided. He applied both his foot and emergency brakes, but the momentum carried the bus along for some distance, and while so moving his left front wheel ran on the hard surface of the macadam road and the right wheel ran on the loose gravel part of the road, and this deflected the course of the bus toward the north edge of the road. It continued its course very slowly, and when it got to the edge of the road had almost stopped, but still had momentum sufficient to bring the right front wheel over the edge of the road, and at that moment the bus overturned and dropped to the bottom of the embankment in the field adjoining. In going down it struck the top of the retaining wall and tore some of it out. The intestate was caught between the top of the seat in the bus and the bottom of the embankment, and was so injured that within a short time after the injury the child died from the effects thereof. The claimant asserts that the state road at the point of the accident was defective because the state had placed loose gravel on the side of the road and failed to erect a guard or barrier along the north side or edge thereof; and that by reason of these defects the accident occurred from which the deceased received his injuries which caused his death.

The state asserts that the deceased was guilty of

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contributory negligence and that it was not negligent in putting loose gravel on the road and not negligent in failing to place a guard or barrier at this point, and that a guard is only placed along embankments and dangerous places to warn persons traveling on the highway of such danger, and not placed there to protect the travel from going over such bank by building it strong enough to prevent vehicles from breaking through the barrier and going over such embankment.

It was not negligence for the state to place loose gravel on the surface of the dirt road for the purpose of bringing it up to the level of the macadam. It could not permit the dirt roadway adjoining the macadam road to wear down so as to make an abrupt shoulder as this would make it dangerous for ordinary travel and we do not think it was negligence for the state to fail to roll or pack this gravel down as no amount of packing or rolling would prevent a heavy vehicle from cutting into it.

Originally there was no liability on the part of the town for any defects in its highways and under the common law the commissioner of highways or officers exercising similar function were held liable for damages if they failed in their duty in keeping highways reasonably safe for public travel when they had sufficient funds to repair such highways.

The legislature by section 74, chapter 30 of the Laws of 1909 made towns liable for damages sustained by reason of *defects* in highways sustained by persons traveling over such highways and which statute creating such liability reads as follows: "Every town shall be liable for all damages to persons or property sustained by reason of any *defect* in its highways or bridges, existing because of the neglect of any town superintendent of such town."

Primarily the state is not liable for negligence and

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cannot be sued in its courts nor made liable for damages. This is in consequence of its sovereignty and the state is always immune from actions or liability unless it expressly waives such immunity and assumes liability. *Smith* v. *State of New York,* 227 N. Y. 405; *Lewis* v. *State of New York,* 96 id. 71; *Rexford* v. *State of New York,* 105 id. 229.

By section 176 of the Highway Law, being chapter 30 of the Laws of 1909, and amendments thereto, the state assumed liability for *defects* in its highways where the state highway was under the patrol system and the statute assuming such liability reads as follows: "The state shall not be liable for damages suffered by any person from *defects* in state and county highways, except such highways as are maintained by the state by the patrol system, but the liability for such damages shall otherwise remain as now provided by law, notwithstanding the construction or improvement and maintenance of such highways by the state under this chapter."

Section 74, chapter 30 of the Laws of 1909, being the Highway Law, wherein the town was made liable for damages, created liability only where injury was caused by reason of defects in its highway and the state when it assumed liability by an enactment through the legislature assumed such liability only for defects in its highways under the patrol system, so that in each case in giving a right of action the legislature predicated the right to recover upon defects in the highway; and it must be assumed that when the state, through its legislature, assumed liability and used the word "defect" in the statute, that this language was to receive the same interpretation and construction as had been given to the word "defect" by judicial interpretation and construction of the act holding towns liable for defects of highways. The

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state when it created a tribunal to hear, try and determine claims against it provided, " in no case shall any liability be implied against the state, and no award shall be made on any claim against the state except upon such legal evidence as would establish liability against an individual or corporation in a court of law or equity." Code Civ. Pro. § 264. The state in keeping its highways in repair, to make them safe for public travel, was obligated to place gravel upon the sides of macadam roads from time to time as they wore away from use by the public to prevent an abrupt shoulder being created or made; and we do not think it was negligence on the part of the state to follow the ordinary custom of placing loose gravel on the dirt part of the ordinary constructed state highway and to bring it up to the level of the macadam surfaced part of the road. *Sharot* v. *City of New York,* 177 App. Div. 869; affd., 226 N. Y. 679; *King* v. *Village of Fort Ann,* 180 id. 496; *Flansburg* v. *Town of Elbridge,* 205 id. 423.

There can also be no question that when two causes combine to produce injury to a traveler upon a highway both of which are in their nature proximate, the one being a palpable defect in the highway and the other some occurrence for which neither party is responsible, the defendant is liable provided the injury would not have been sustained but for such defect. *Ring* v. *City of Cohoes,* 77 N. Y. 83; *Sweet* v. *Perkins,* 196 id. 482; *Thompson* v. *Town of Bath,* 142 App. Div. 331.

But before this rule is applicable to this case it must be established that the state was guilty of negligence by permitting *defects* to exist in its highway. We have examined many authorities where, under the statute holding the towns liable for defects, towns were held liable for failure

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to erect barriers, but in each of these cases the failure to erect a barrier and for which the town is held liable, the facts were much different than they are in this case. Usually there were circumstances which made the highway dangerous owing to the fact that there was a sharp curve, a narrow road, a steep hill, or many other circumstances which ordinarily justified a jury in finding that the commissioner of highways of the town was negligent in not placing a barrier at such locations. And while it is said the question of negligence and whether a barrier should be placed along the highway for the protection of the public is a question of fact for the jury, yet as was said in the case of *Lane* v. *Town of Hancock*, 142 N. Y. 510, by Judge O'Brien writing the opinion, on page 519: "The elements which enter into the question of negligence are generally of such a nature as to make it a question of fact. Even where the general facts are not in dispute, as here, but the inference to be drawn from them is not clear and certain, but doubtful, the case must be submitted to the jury. But in every case there is always a preliminary question for the court as to whether there is any evidence upon which a jury could properly find a verdict for the party producing it, and upon whom the burden of proof is imposed. If there is not the court must direct a non-suit or a verdict as the case may require."

This rule was followed in *Lane* v. *Town of Hancock*, 142 N. Y. 510; *Coney* v. *Town of Gilboa*, 55 App. Div. 111.

In the case on trial the roadway was twenty-two feet in width. It was perfectly straight for a long distance, was substantially level with the lands adjoining on one side and with an embankment of about twelve feet at the deepest point on the other side, and as the state can only be held liable where the same state of facts

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would make a town liable for defects in its highway the same rule should be applied in each case. Under the circumstances if this action was against a town the town under the authorities would not be liable because the town or its commissioner could not reasonably be held to anticipate an emergency of the kind that occurred in this case.

There are many authorities in this state which hold where the conditions are similar to those in the case on trial and where an emergency occurred which caused an accident, that such condition was not a defect and it was further held that it was not negligence on the part of its commissioner to fail to erect barriers at such places.

It has recently been decided by the Appellate Division, third department, where the circumstances were the same as they are in this case where the plaintiff was driving an automobile truck upon an improved macadam highway, smooth and level for twenty feet in width, and the automobile locked wheels with a passing buggy, and in doing so the automobile turned at right angles to the road and went head over the embankment, that the commissioner of highways was not negligent in failing to erect barriers at a location of this kind. And it was further held that he was under no duty to anticipate such an emergency. *Dorrer* v. *Town of Callicoon,* 183 App. Div. 186.

Under the former rule where the commissioner was liable, and after the enactment of the statute making the town liable for defects in the highway, it has frequently been held that the town was not an insurer of the safety of persons traveling upon the highway, but was only required to use ordinary prudence and care; and the commissioner and town were held to the sensible rule which required them to exercise ordinary care, and at no time was the commissioner expected to anticipate some unusual and unforeseen

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event and guard against it. It cannot be said that a commissioner of highways under this rule would have been expected to anticipate an emergency which occurred in this case. While, as a rule, it is a question of fact for a jury to determine whether the commissioner was negligent from all the facts and circumstances, in this case there were no disputed facts as to the location, distance and surrounding circumstances; and under numerous authorities where the roadway was of sufficient width and was a straight road and substantially level, it was held as a matter of law that it was not negligence to fail to erect barriers or guards where there was an embankment so near the road as to permit vehicles going over the bank where some sudden or unforeseen emergency occurs. *Lane* v. *Town of Hancock,* 142 N. Y. 510; *Waller* v. *Town of Hebron,* 5 App. Div. 577; 17 id. 158; 131 N. Y. 447; *Hubbell* v. *Yonkers,* 104 id. 434; *Monk* v. *Town of New Utrecht,* Id. 552; *Wade* v. *Town of Worcester,* 134 App. Div. 51.

We do not think that the fact that there was loose gravel on the dirt part of this road, placed there by the state, was anything which would call upon a commissioner if he had charge of the road to anticipate danger by reason thereof. It was a part of the duty of the state to make that portion of the road safe for travel and not allow it to wear down, and in doing this the state was not negligent in failing to anticipate the emergency that occurred at the time of the accident in this case. The authorities cited hold that the conditions as they existed at the time of the accident to the claimant were not a defect. The claim of the claimant should, therefore, be dismissed.

ACKERSON, P. J., concurs.

Claim dismissed.

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## Matter of the Application of CHARLES F. MCPHERSON, as Executor of the Will of ELLA J. MILLER, to Carry Out a Contract of Sale of Real Estate.

(Surrogate's Court, Delaware County, January, 1921.)

**Executors and administrators — when order will be made directing executor to convey real estate pursuant to contract — wills — estoppel — Code Civ. Pro. § 2697.**

Where by a deed of conveyance of a farm, containing a reservation to the grantor of the house and lot, a part of the farm, it was covenanted and agreed that the grantee, after the death of his grantor or whenever she was ready to sell, should have the option of buying the house and lot, an order may be granted under section 2697 of the Code of Civil Procedure, directing the executor of the grantor to execute and deliver to said grantee a deed of the house and lot.

The fact that said grantee when the will was read, by which his grantor devised the house and lot subject to the option given to him, stated that he did not desire the house and lot mentioned, did not estop him from claiming his rights under his contract with the testatrix.

PROCEEDING under section 2697 of the Code of Civil Procedure by the executor of the last will and testament of Ella J. Miller, deceased, for an order of this court directing the executor to execute and deliver a deed.

On or about the 21st day of March, 1917, the testatrix and Frank T. Miller entered into a contract under seal by which it was provided that the testatrix having on that date sold and conveyed to Miller her farm in the town of Bovina, and having reserved the house and lot which was a part of said farm, it was covenanted and agreed that said Frank T. Miller should have the privilege or option of buying said house and lot for the sum of $1,500 after the death of the testatrix or when-

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ever she was ready to sell the property. The agreement applied to and was to bind the heirs, executors and administrators of the respective parties.

Ella J. Miller, the testatrix, thereafter on the 23d day of July, 1918, made her last will and testament by the 2d paragraph of which she provided as follows:

"*Second.* I give, devise and bequeath to my sister Mrs. Elizabeth J. Russell my house and lot in Bovina Center, N. Y., to her, her heirs and assigns forever, said house and lot being subject to an option given by me to Frank T. Miller. If at my death the said Frank T. Miller accepts the house and lot at $1,500 the price agreed upon, then I give and bequeath to my said sister the $1,500 in place of the house and lot * * *."

Ella J. Miller died on or about the 3d day of June, 1920. Her last will and testament was duly admitted to probate on or about the 14th day of June, 1920, and letters testamentary issued to the petitioner herein.

A short time after the death of the testatrix her last will and testament was opened by Thomas Gordon, the scrivener who drew the will, in the presence of her relatives and was read to them. It is conceded that when the 2d paragraph of such will was read, Frank T. Miller stated that he did not desire the house and lot mentioned, that he already had a house, and Mr. Gordon stated, "Then the property belongs to Mrs. Russell."

After the will was probated, Mr. Miller advised the executor that he desired the place and told him he wanted the deed. The executor testifies that Mr. Miller told him to this effect within a month after the will was probated.

The executor has instituted this proceeding by a petition under section 2697 of the Code and cited all of the persons interested in the estate of Ella J. Miller.

Elizabeth J. Russell, the devisee mentioned in the

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2d paragraph of the will, has appeared and objects to an order being made directing a conveyance of the property in question to Frank T. Miller upon the ground that he has waived his right to receive a conveyance therefor.

Hamilton J. Hewitt, for Charles F. McPherson, executor.

Fred W. Youmans, for Frank T. Miller.

Edward O'Connor, for Elizabeth J. Russell.

MCNAUGHT, S. The facts are undisputed in this proceeding. The agreement made between the testatrix and Frank T. Miller on March 21, 1917, was to all intents and purposes a contract for the conveyance of real estate which bound not only the parties, but their heirs, executors and administrators. The testatrix could not by any provision in her will or by any act of hers deprive Miller of his rights under such agreement. This fact is recognized by the language of the 2d paragraph of the will. The provision in both the contract and will is practically the same in regard to the time of performance. In the contract the language is " after her death;" in the will the language used is " at my death."

In any event Miller would have been entitled to a reasonable time in which to exercise his right to take the property and was not bound to determine whether he would take the property or not until such time after the death of the testatrix as the will had been probated and the executor duly qualified, for until such time no one was in a position or would have been in a position to perform the contract entered into by the testatrix.

The sole question is whether the statement or remark made by Miller when the will was read con-

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stituted a waiver and relinquishment of his rights under the contract so that he could not thereafter enforce the same.

The attention of the court has not been called to any case directly in point, nor has the court been able to discover a parallel case. The doctrine of waiver is presented most frequently in those cases which have arisen out of litigation over insurance policies, but it is a doctrine of general application confined to no particular class of cases. A waiver has been defined to be the intentional relinquishment of a known right. It is voluntary and implies an election to dispense with something of value or forego some advantage which the party waiving it might at its option have demanded or insisted upon. *Cowenhoven* v. *Ball*, 118 N. Y. 234.

In the case of *Draper* v. *Oswego County F. R. Assn.*, 190 N. Y. 12, 16, Chief Judge Cullen, in speaking for the court upon this subject, said: "While that doctrine and the doctrine of equitable estoppel are often confused in insurance litigation, there is a clear distinction between the two. A waiver is the voluntary abandonment or relinquishment by a party of some right or advantage. As said by my brother Vann in the *Kiernan Case* (150 N. Y. 190): 'The law of waiver seems to be a technical doctrine, introduced and applied by the courts for the purpose of defeating forfeitures. * * * While the principle may not be easily classified, it is well established that if the words and acts of the insurer reasonably justify the conclusion that with full knowledge of all the facts it intended to abandon or not to insist upon the particular defense afterwards relied upon, a verdict or finding to that effect establishes a waiver, which, if it once exists, can never be revoked.' The doctrine of equitable estoppel, or estoppel *in pais*, is that a party

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may be precluded by his acts and conduct from asserting a right to the detriment of another party who, entitled to rely on such conduct, has acted upon it. * * * As already said, the doctrine of waiver is to relieve against forfeiture; it requires no consideration for a waiver, nor any prejudice or injury to the other party." To the same effect, see *Knarston* v. *Manhattan Life Ins. Co.*, 140 Cal. 57.

At the time of the alleged waiver no person was in a position to act upon it. It does not appear that Mrs. Russell or any other person has in any manner acted upon said waiver or been in any way affected by it. At the time the will was read to the relatives it was unknown to any of the parties whether the will was a valid testamentary disposition of the property of the testatrix or not. It was unknown whether the will would be admitted to probate or rejected, and no one has been affected by the statement made by Frank T. Miller.

The important question for determination is whether Miller because of his statement when the will was read is estopped from claiming his rights under the agreement of March 21, 1917.

In *New York Rubber Co.* v. *Rothery*, 107 N. Y. 310, Judge Peckham defines an estoppel as follows: "To constitute it the person to be estopped must do some act or make some admission with the intention of influencing the conduct of another, or that he had reason to believe would influence his conduct, and which act or admission is inconsistent with the claim he proposes now to make. The other party, too, must have acted upon the strength of such admission or conduct."

A party may be precluded by his acts and conduct from asserting a right to the detriment of another

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party, who, entitled to rely on such conduct, has acted upon it. *Clark* v. *West*, 193 N. Y. 349.

There is no evidence and it is not even contended Mrs. Russell has in any manner acted upon the statement of Miller or been affected to her detriment by reason of such statement.

It is, therefore, the conclusion of the court that the objections of Mrs. Russell must be overruled and that Frank T. Miller under his contract with the testatrix is entitled to receive from the executor a conveyance of the property in question.

The court has not overlooked in reaching this conclusion the decision of the Court of Appeals in the case of *Alsens A. P. C. Works* v. *Degnon Contracting Co.*, 222 N. Y. 34.

A decree may be prepared in conformity to the prayer of the petitioner herein and the form of the same may be agreed upon by the parties, or may be settled before the surrogate at Delhi any Monday.

Decreed accordingly.

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## Matter of the Judicial Settlement of the Accounts of JANE M. SULLARD as Temporary Administratrix of the Estate of GEORGE F. SULLARD, Absentee.

(Surrogate's Court, Delaware County, January, 1921.)

**Surrogates' Courts — jurisdiction — when real estate of surety not impressed with an equitable lien — executors and administrators — trustees.**

Upon a stipulation between the temporary administratrix of an absentee and the substituted trustee, the amount of the defalcation or indebtedness of the absentee, as testamentary trustee, was agreed upon and approved by the surrogate and though no order was entered the amount so agreed upon was accepted by the administratrix as a claim against the estate of

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the absentee. An order duly granted directing the sale of two certain parcels of real estate of the absentee provided that the right, lien or claim of priority of claimant or equities of the substituted trustee, who objected to the sale of one of the said parcels, be transferred to the avails from the sale of the said real estate and the right thereto determined when the matter of the disposition of the proceeds of the sale of both parcels came before the court for determination. The father of the absentee who was one of the sureties on his official bond as testamentary trustee, devised the parcel, the sale of which was objected to by the substituted trustee, to his widow for life, since deceased, then to the absentee. Upon the judicial settlement of the accounts of the administratrix, all necessary parties being in court, *held*, that the court had jurisdiction to determine the rights of the various creditors and claimants to payment out of the proceeds of the real estate including the parcel devised to the absentee by his father's will.

The claim of the substituted trustee to be entitled to priority or preference of payment from the proceeds of the sale of the real estate devised to the absentee, on the ground that he received it impressed with an equitable lien from his father who was surety for the faithful performance of the absentee's official duties as testamentary trustee and also subject to the absentee's liability as an heir of such surety, cannot be allowed and the proceeds of sale must be applied *pro rata* in satisfaction of all of the obligations of the absentee.

JUDICIAL settlement of accounts of temporary administratrix involving also the disposition of the proceeds of the sale of certain real estate for the payment of debts.

George F. Sullard, a resident of the town of Franklin in the county of Delaware, disappeared on the 27th day of June, 1916, and has not since been heard from. On the 15th day of July, 1916, his wife, Jane M. Sullard, was appointed temporary administratrix of his estate. The estate has since been administered under the provisions of the Code of Civil Procedure as that of an absentee.

The administratrix reduced the personal property



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to cash and a decree was made in this proceeding on the 31st day of May, 1918, settling the account to such date and directing the payment of a dividend of twenty-four per cent to the creditors of the absentee.

The absentee was trustee under the last will and testament of Anna D. Lockwood, deceased, for the benefit of Nellie Gilliland and Josephine Otis. Subsequent to the disappearance of George F. Sullard, application was made to the Supreme Court for the appointment of a substituted trustee and an order was made appointing Clinton F. McHenry as substituted testamentary trustee of the estate of Anna D. Lockwood. Such order further directed the absentee and the temporary administratrix to account for all the acts and proceedings of said George F. Sullard as such testamentary trustee.

It appears from the record that thereafter the administratrix filed an account in the Supreme Court but it does not appear whether an order was made in relation thereto or not. The record discloses that the substituted trustee presented a claim against the estate of the absentee, and such claim was compromised, adjusted and accepted as a claim against the estate of the absentee at the sum of $2,370.80 as of May 31, 1918.

A proceeding was thereafter instituted by the temporary administratrix for an order directing the sale of the real estate of the absentee for the payment of debts. It appears from the petition in such proceeding that the real estate consisted of two parcels, one designated as parcel No. 1, known as the "store property," and the other designated as parcel No. 2, known as the "house and lot." Upon the return day of the citation in such proceeding, the substituted trustee duly appeared and objected to the sale of that portion of the real estate designated as parcel No. 1

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upon the ground that such real estate was owned by Albert E. Sullard, the father of the absentee and one of the sureties upon his official bond as trustee of the estate of Anna D. Lockwood, and alleging the absentee had failed to account for moneys received by him as such trustee, and the parcel in question was impressed with a lien in the sum of $2,370.80 in favor of the trust estate. An order was thereupon made by the then surrogate on the 28th day of October, 1918, directing the sale of both parcels, but providing, after reciting the objections of the substituted trustee, that the right, lien or claim of priority of payment or equities of the substituted trustee be transferred to the avails from the sale of the said real estate and the right thereto be determined when the matter of the disposition of the proceeds came before the court for determination. Parcel No. 1 was thereafter sold for the sum of $1,625.

It is conceded that parcel No. 1 was owned by Albert E. Sullard, the father of the absentee in his lifetime; that he was one of the sureties upon the bond of the absentee as trustee under the will of Anna D. Lockwood, which bond was executed on the 9th day of March, 1891; that Albert E. Sullard died November 19, 1898, leaving a last will and testament which was duly probated and that Sarah Sullard, the widow of Albert E. Sullard, died October 26, 1907.

It appears from the will of Albert E. Sullard that the real estate known as parcel No. 1 was devised to the widow for life and then to George F. Sullard, the absentee, he becoming the owner thereof upon the termination of the life estate of his mother.

The substituted trustee claims he is entitled to preference and to priority of payment from the proceeds of the sale of parcel No. 1, alleging the bond of the absentee and trustee was the joint and several obligation of the principal and sureties and bound

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themselves, their heirs, executors and administrators, thereby creating an equitable lien upon the real estate of the surety, Albert E. Sullard. He claims when the real estate passed under the will of Albert E. Sullard to the absentee, George F. Sullard, the absentee took the property devised to him subject to the liability of the surety upon the bond and impressed with an equitable lien, and for such reasons he is entitled to priority of payment, and the proceeds of the sale of said parcel should be first applied in payment of the amount it is conceded is due from the absentee as trustee.

Wm. F. White (Samuel H. Fancher, of counsel), for Jane M. Sullard, administratrix.

Albert F. Barnes, for Clinton F. McHenry, substituted trustee under the last will and testament of Anna D. Lockwood.

Seybolt & Seybolt, for Alton O. Potter.

Edwin A. Mackey, for George D. Chamberlain and others.

MCNAUGHT, S. The amount of the defalcation or indebtedness of George F. Sullard, the absentee, as trustee under the will of Anna D. Lockwood was agreed upon by a stipulation between the administratrix and the substituted trustee and approved by the then surrogate of the county of Delaware. The amount was fixed at the sum of $2,370.80. It does not appear that there has been a judicial settlement or an order entered in any court fixing this amount, but it appears to have been agreed upon and approved by the surrogate.

Two questions are presented for determination:

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*First,* the jurisdiction of the Surrogate's Court to determine the rights of the various creditors and claimants to payment of their claims out of the proceeds of the sale of the real estate of the absentee, including parcel No. 1 devised to him by the will of his father, Albert E. Sullard. *Second,* whether the claim of the substituted trustee is entitled to priority or preference of payment over the claims of other creditors to the proceeds of parcel No. 1, the so-called store property owned by Albert E. Sullard in his lifetime.

All of the necessary parties are in court. Every person who could in any manner be interested in the determination of the questions involved is a party to this proceeding. There is no dispute as to title of the property sold, the source from which title was derived, or the amount of the proceeds. The claims against the absentee have been fixed and determined. The amount due the substituted trustee has been settled, agreed upon and approved by the surrogate. The sole question is whether the proceeds shall be applied *pro rata* to all the debts of the absentee or whether the substituted trustee is entitled to have all of the proceeds of the sale of the store property applied in payment of his claim.

The Surrogate's Court has jurisdiction upon a judicial settlement to try and determine all questions legal and equitable arising between all of the parties to the proceeding. Code Civ. Pro. § 2510. In proceedings to sell real estate for the payment of debts, the Surrogate's Court has jurisdiction to try and determine all claims, demands or charges relative to the proceeds of such sale. Code Civ. Pro. § 2706.

The surrogate has jurisdiction and power to determine the validity of all claims against or upon an estate. *People ex rel. Adams* v. *Westbrook,* 61 How.

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Pr. 138; *Kammerrer* v. *Ziegler*, 1 Dem. 177; *Matter of Haxtun*, 102 N. Y. 157; *Matter of Pirie*, 133 App. Div. 431; *Matter of Roberts*, 214 N. Y. 369.

The claim of the substituted trustee to preference and priority of payment over all other creditors, of the proceeds of the sale of the store property, is based upon the theory that Albert E. Sullard, from whom the absentee derived title, and who was the owner of the property during his lifetime, being also a surety upon the bond of the absentee as trustee, had impressed such property with an equitable lien by becoming surety for the faithful performance of his official duties by the trustee. It is, therefore, contended that when the absentee received the property by devise from his father, he received it impressed with such lien and also subject to his liability as an heir of the surety.

Clearly the assumption of liability as a surety by Albert E. Sullard did not create any lien upon his real estate. The bond was a guaranty the principal would perform his duty. Until such time as a default occurred it was a contingent liability. It is not claimed that a default had occurred, nor that there was any existing debt due from Albert E. Sullard nor any claim against him aside from his contingent liability upon the bond at the time of his death.

The liability of Albert E. Sullard as surety was such that his liability upon the bond after his death became and remained the liability of his estate and his heirs. The death of one who is a surety upon an official bond does not relieve his estate of liability for the principal's after management of his trust. *Mundorff* v. *Wangler*, 57 How. Pr. 372; *Stevens* v. *Stevens*, 2 Dem. 469; *Holthausen* v. *Kells*, 18 App. Div. 80.

The obligation of the surety bound himself, his heirs, and legal representatives. The estate of the

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surety, and, therefore, his heir, George F. Sullard, was liable upon the bond for the subsequent default of the trustee, but there was no liability fixed and determined at the time of the death of Albert E. Sullard, the surety. The property, therefore, could not be sold, and it is not contended that it has been sold, as property of the surety to satisfy an obligation upon his part which was in the nature of a debt.

The exhaustive briefs presented by able counsel fail to call the attention of the court to a single authority in this or any other jurisdiction which is directly in point. Careful research has failed to disclose a case where the same claim has been made under a similar state of facts.

The situation presented resolves itself into this condition. The principal by devise becomes the owner of the real property of his deceased surety. He, therefore, is principal and as heir of the surety vested with the estate still liable upon the bond. A default occurs (when does not appear) and it is determined there is due from the estate of the principal a certain sum (in this case, $2,370.80). The successor of the principal now claims to be entitled to the full proceeds of the parcel of real estate which has so descended by devise to the original trustee because he received it impressed with a lien. This contention it is impossible to sustain as the bond itself created no lien.

The only other theory upon which the claim of the substituted trustee could be sustained is under the provisions of section 101 of the Decedent Estate Law, formerly section 1843 of the Code, which provides: "The heirs of an intestate, and the heirs and devisees of a testator, are respectively liable for the debts of the decedent, arising by simple contract, or by specialty, to the extent of the estate, interest, and right in the real property, which descended to them

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from, or was effectually devised to them by, the decedent."

The liability upon the death of the surety became not the liability of the testator Albert E. Sullard, but of the estate held by the devisee George F. Sullard to perform created by reason of the execution of the bond by the surety. When the property descended by devise to George F. Sullard, the estate was liable for the debts of Albert E. Sullard and also responsible to answer for his liability as surety upon the bond; but at that time the liability was only contingent, it was not fixed and determined, and no debt actually existed on the part of Albert E. Sullard. If no lien upon the land was created by the mere execution of the bond, and if no debt existed at the death of Albert E. Sullard, then all the liability of George F. Sullard was his obligation as heir holding the estate to perform as surety upon the bond if called upon to do so.

Section 101 of the Decedent Estate Law does not create an absolute liability against the heirs, but merely provides a method for enforcing an existing liability of the decedent against his assets which have come into the hands of his heirs. *Hill* v. *Moore,* 131 App. Div. 365.

The liability under this provision extends only to the real property acquired by descent or devise at the time of the decease, and does not reach that which may be made out of it by the skill, management or labor of the heir or devisee. *Clift* v. *Moses,* 116 N. Y. 144, 158.

An action under section 101 of the Decedent Estate Law is not an action to *enforce,* but an action to *acquire* a lien upon real property, and to authorize its sale for the purpose of satisfying a debt. *Rogers* v. *Patterson,* 79 Hun, 483; *Covell* v. *Weston,* 20 Johns.

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414; *Hauselt* v. *Patterson,* 124 N. Y. 349; *Mortimer* v. *Chambers,* 63 Hun, 335.

It is an action in equity having the nature of a proceeding *in rem* in such sense that when the land has not been aliened by the heir, the judgment must direct that the debt of the plaintiff be collected out of the real property. *Hauselt* v. *Patterson, supra.*

"The basis of the action is the debt which the deceased owed the plaintiff; but that is not the gist of it. It is not an action for the recovery of money only, although the ultimate object of it is to obtain money; * * * but it is an equitable action to reach certain real estate, which the deceased devised to the defendants and to authorize its sale for the purpose of satisfying a debt that the deceased owed the plaintiff. It is strictly an action *in rem.*" *Wood* v. *Wood,* 26 Barb. 356.

The general rule is well settled that sureties are not liable until there is a default of their principal, and such default has been established. It has been repeatedly held that no action can be maintained against such sureties until an accounting has been had, or until their principal or personal representative has disobeyed some valid order or decree of the court having jurisdiction. *Hood* v. *Hood,* 85 N. Y. 561; *Rouse* v. *Payne,* 120 App. Div. 667; *Haight* v. *Brisbin,* 100 N. Y. 219; *Perkins* v. *Stimmel,* 114 id. 359; *French* v. *Dauchy,* 134 id. 543.

In the administration of this estate it has been determined that the absentee as trustee under the will of Anna D. Lockwood is indebted to the trust estate in a certain sum. The substituted trustee has presented a claim and the claim has been compromised and adjusted and the amount determined to be due the substituted trustee representing the trust estate has been fixed. The estate of the absentee is liable to the

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substituted trustee as a creditor the same as it is liable to other creditors. The substituted trustee now seeks under this state of facts to procure a decree directing the proceeds of the sale of the property which came to the absentee from his father, the surety, shall be paid to him in satisfaction of such debt in preference, and prior to the claims, of all other creditors.

As before stated no case directly in point has come to the attention of the court, although it has been held that a creditor holding a specialty debt due from an intestate and coming against the estate of his administrator on account of a devastavit can only take equally with such administrator's simple contract creditors. *Carow* v. *Mowatt,* 2 Edw. Ch. 56.

The claim of the substituted trustee cannot be allowed. The property owned by the absentee and which was sold in this proceeding for the payment of his debts must be applied *pro rata* in satisfaction of all of his obligations.

The estate of the absentee is liable as principal to account for the trust funds in his possession, but the remedy as to the sureties, if the funds coming into the hands of the temporary administratrix are insufficient to pay all of the debts, including such fund, is not in this proceeding.

A decree may be prepared in conformity with this opinion. The question of allowances will be held open until such time as the decree is noticed for settlement.

Decreed accordingly.

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# Matter of the Judicial Settlement of the Account of ARTHUR S. REYNOLDS, as Executor of ETTA FREDENBURG BURCHAM, as Executrix of DAVID FREDENBURG, Deceased.

(Surrogate's Court, Delaware County, January, 1921.)

**Wills — construction of — intention of testator — life estates — gifts — power of sale — sale of real estate — executors and administrators.**

Where an estate is given in one part of a will in clear and decisive terms, it cannot be taken away or cut down by raising a doubt as to the meaning or application of a subsequent clause, nor by any subsequent words which are not as clear and decisive as the words granting the estate. (P. 304.)

The intention of the testator as clearly shown by a certain paragraph of his will, which was drawn by an inexperienced layman, was to give to his wife all his estate, real and personal, subject to two conditions: 1. That she should provide a suitable home for his children, maintain them and give them an education. 2. That when they respectively arrived at the age of twenty-one years, she should pay each of them $500, except that she should pay to or for the benefit of one son, the sum of $700. *Held,* that as to give effect to a succeeding provision, that in the event of the death of the mother before any of the children attained their majority, testator's property should be sold and divided and go to his four children share and share alike, would of necessity convert the estate of the wife from a fee into a conditional life estate until at least one of the children became of age, such provision should be construed as precatory, and so construed was consistent with the absolute gift to the wife. (P. 305.)

A still later provision, that in the event of the death of the wife after either of the children arrived at the age of twenty-one years and they had received the sums mentioned, then the estate should be sold and the proceeds given to the children in equal shares with deduction of sums already paid to them, is so indefinite and ambiguous that it cannot be given effect to cut down the gift to the wife. (P. 306.)

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A provision vesting in testator's wife full power to sell and convey any portion of the estate with the consent and approval of one son and the daughter, the proceeds of such sale to be applied to any debt that might be a claim against the estate, was not necessarily to be construed as indicating any intention of testator to give his wife only a life estate. (Pp. 306, 307.)

The absolute gift to the wife was not rendered void because of her failure to pay the sums as conditioned by the gift to her, because the children could enforce the payment of the amount due or to which they were entitled under the provision of gifts to the wife, against her estate. (P. 308.)

JUDICIAL settlement of account by executor of deceased executrix, in which proceeding judicial construction of the will of David Fredenburg is involved.

The last will and testament of David Fredenburg, a resident of the town of Roxbury, Delaware county, was admitted to probate January 3, 1903, and letters testamentary issued to Etta Fredenburg, the wife of the testator, the executrix named in said will.

The testator at the time of his death was the owner of a farm of land with personal property thereon situate in the town of Roxbury. The testator was survived by his wife and four infant children, one daughter and three sons. The executrix took possession of the real and personal property, conducted and operated the farm and transacted all business thereafter as her own and in her own name. The executrix subsequently remarried. No inventory was made or filed and no account was rendered by the executrix in her lifetime.

The eldest son, Harry, became twenty-one years of age in the year 1907 and died in the year 1908 survived by his mother, one sister and two brothers. The daughter, Carrie, became twenty-one years of age in the year 1909, was married in 1910 and died September, 1919, survived by her husband and one son, Frank Peckham. The son Charles became twenty-one years

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of age in the year 1911 and the son George in the year 1918, both of whom are living, and together with the infant survivor of the deceased daughter are parties to this proceeding.

During the time the widow and executrix was in occupation and operating the farm left by the testator, she improved the property, paid the debts of the testator and erected a new barn upon the farm at an expense of approximately $2,300.

The will of the testator which must be construed in this proceeding, after directing the payment of debts and funeral expenses, provided as follows:

"*Second.* I give and bequeath to my beloved wife Etta Fredenburg all of my real estate and personal property of every kind and description of which I shall die *possessed* provided

"*First.* That she shall provide a suitable home for my children clothe and feed them care for them in sickness and in health and give them an education.

"*Second.* That when my son Harry Fredenburg shall arrive at the age of 21 years she shall pay to him the sum of five Hundred dollars. When my daughter Carrie Fredenburg shall arrive at the age of 21 years she shall pay to her the sum of five hundred dollars. That when my son Charles Fredenburg shall arrive at the age of 21 years she shall pay to him, or deposit with some suitable trust Company or Savings institution for his benefit the sum of Seven hundred dollars. When my son George Fredenburg shall arrive at the age of 21 years she shall pay to him the sum of five hundred dollars.

"*Second.* In the event of the death of my wife before any of my children arrive at the age of 21 years it is my will that all of the property of which I shall die *possessed* shall be sold and thé proceeds of such sale shall be divided in to four equal share which

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shall be given to my children Harry, Carrie, Charles and George share and share alike.

"*Third.* In the event of the death of my wife after either of my children have arrived at the age of 21 years and they have received the sums *hereinbefore* mentioned then my estate shall be sold and the proceeds of such sale shall be divided in to four equal shares and given to my children Harry, Carrie, Charles and George share and share alike except that the sums already paid to them when they had arrived at the age of 21 years shall be deducted from their share.

"*Fourth.* I will and ordain that my beloved wife Etta Fredenburg with the consent and approval of my son Harry Fredenburg and my daughter Carrie Fredenburg, shall have full power and authority to sell or convey any portion of my estate to any person or persons and their heirs forever, the proceeds of such sale to be applied to any debts that may be a claim upon my estate."

No question is raised as to the account filed by the executor of the deceased executrix. The principal question for determination is whether under the terms of the will of the testator, the property passed to the widow, or because of the peculiar provisions of the will, is now vested in the surviving sons and the infant descendant of the daughter Carrie.

Ives & Craft, for Arthur S. Reynolds, executor, etc.

Leonard A. Govern, special guardian for Harry Peckham, an infant.

George Fredenburg, individually and as administrator with the will annexed of David Fredenburg, deceased, in person.

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MCNAUGHT, S. The difficulties incident to construing the will here involved furnish a forcible illustration of the inadvisability of having a testamentary disposition of property drawn by an inexperienced layman. It is a fundamental principle of the law relating to the construction of wills that the intention of the testator must govern and must be given full force and effect if such intention can be drawn from the instrument propounded. It is a platitude that "no will has a brother." The diversity in wills is as great as the difference in individuals. In most instances the citation of numerous authorities are seldom of great value or assistance except as they treat of similar cases, or bear upon the general rules of construction.

By the 2d paragraph of the will of the testator it is manifest, standing alone, there would be but one possible construction to be given to it, and that is that by its terms it was the intention of the testator to give to his wife all of his real estate and personal property subject to two conditions: *First,* that she should provide a suitable home for his children, maintain them and give them an education. *Second,* that when they respectively arrived at the age of twenty-one years, she should pay each one of them $500 excepting she should pay to or for the benefit of the son Charles the sum of $700.

The language of the 2d paragraph of the will and the conditions numbered "first" and "second" in said paragraph are plain, unequivocal and free from ambiguity. The difficulty arises when an attempt is made to reconcile the provisions of the 3d and 4th paragraphs with the absolute gift of the 2d pargraph.

By the two subsequent paragraphs it is provided, *first,* that in the event of the death of the wife before any of the children arrived at twenty-one years of age, the property of the testator should be sold and divided

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into four equal shares and go to the four children share and share alike. By the next paragraph it is apparently provided that in the event of the death of the wife after any of the children arrived at the age of twenty-one years and they had received the sums mentioned, then the estate should be sold and the proceeds divided into four equal shares and given to the children except that the sums already paid them should be deducted from their share.

Where an estate is given in one part of a will in clear and decisive terms it cannot be taken away or cut down by raising a doubt as to the meaning or application of a subsequent clause, nor by any subsequent words which are not as clear and decisive as the words granting the estate. *Roseboom* v. *Roseboom,* 81 N. Y. 359; *Clarke* v. *Leupp,* 88 id. 228; *Campbell* v. *Beaumont,* 91 id. 464; *Matter of Gardner,* 140 id. 122; *Clay* v. *Wood,* 153 id. 134; *Goodwin* v. *Coddington,* 154 id. 283, 286; *Banzer* v. *Banzer,* 156 id. 429; *Adams* v. *Massey,* 184 id. 62; *Sands* v. *Waldo,* 100 Misc. Rep. 288, 293, 294.

"The rule that where clauses in a will are antagonistic the latter must stand as the last expression of intention is never applied unless the last clause is as clear as the first and cannot be reconciled therewith. It is only when the later provision is as plain and decisive as the earlier and the general intention of the testator cannot be gathered from the general scope of the will or otherwise, and when the two provisions are wholly irreconcilable, and cannot possibly stand together, that as a desperate remedy, resort is had to the last clause as expressing the latest intent in order to save one instead of sacrificing both." *Adams* v. *Massey, supra,* and cases cited.

The gift to the wife as contained in the 2d paragraph, being clear and unmistakable in its terms, we

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are called upon to determine the effect of the two subsequent paragraphs. The first of these provides: "In the event of the death of my wife before any of my children arrive at the age of 21 years, it is my will that all of the property of which I shall die possessed shall be sold, and the proceeds of such sale shall be divided into four equal shares which shall be given to my children, Harry, Carrie, Charles and George share and share alike."

To give effect to the language of this paragraph would of necessity convert the estate of the wife from a fee into a conditional life estate until at least one of the children of the testator arrived at the age of twenty-one years.

It seems to the court the language of this clause must be construed as the expression of a desire; that the words used are properly construed as precatory, and so construed are consistent with the absolute gift in the preceding paragraph to the wife. The word "will" in the clause in question may properly be regarded as the expression of a desire.

There are many authorities in which similar provisions, although not expressed in the same language and qualified by precatory words, have been held absolute. In many of the cases the question has arisen upon wills more antagonistic in their expression to an absolute devise than is the instrument under consideration. *Foose* v. *Whitmore,* 82 N. Y. 405; *Lawrence* v. *Cooke,* 104 id. 632; *Matter of Gardner,* 140 id. 122; *Clay* v. *Wood,* 153 id. 134; *Post* v. *Moore,* 181 id. 15.

The succeeding clause reads as follows: "In the event of the death of my wife after either of my children have arrived at the age of 21 years, and have received the sums hereinbefore mentioned, then my estate shall be sold and the proceeds of such sale shall be divided into four equal shares and given to my chil-



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dren Harry, Carrie, Charles and George share and share alike, except that the sums already paid to them, when they had arrived at the age of 21 years shall be deducted from their share."

It seems impossible to reconcile the provisions of this paragraph with the preceding paragraphs of the will. The language is not clear and definite. The meaning and the intention of the testator can hardly be ascertained from the language used. If literally followed, it would seem that compliance with the provision, in the event of the death of the wife after any of the children arrived at the age of twenty-one years, would result in partial intestacy. This certainly would be the result in the event of the death of the wife after all of the children arrived at the age of twenty-one years as is the situation here, for the reason the testator directs that his estate shall be sold and the proceeds of the sale equally divided between his four children, with no provision that the heirs of such children should share; and then further provides that the sums which may have already been paid to them when they arrived at the age of twenty-one years, under the conditions of the second proviso in the 2d paragraph of the will, shall be deducted from their share, but makes no provision whatever as to the disposition to be made of the sums so deducted, and as to such sums, intestacy would result.

The clause is so indefinite and ambiguous it cannot be given effect to cut down the gift to the wife, for the intention to cut down the gift to the wife is not expressed in the clear and unequivocal language required under the authorities cited, *supra.*

Considerable stress is laid upon the language of the succeeding paragraph of the will in which the testator vests his wife with full power and authority to sell and convey any portion of his estate with the con-

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sent and approval of his son Harry Fredenburg and his daughter Carrie Fredenburg, the proceeds of the sale to be applied to any debts that might be a claim upon his estate.

It is contended this provision indicates the testator did not contemplate vesting title in his wife but only to give her a life estate. The provision is not necessarily to be construed in such manner. It seems rather that the testator, desiring the home maintained and having given all of the property to the wife, coupled with the condition that she should maintain the home, added a further condition by this clause of the will by which he provided a way, if necessity required, by which some of the property should be sold for the payment of his debts and required as a condition that the eldest son and the daughter should consent and approve of the sale.

It seems to the court that the construction of the instrument in question already outlined is the only possible construction to be given under the authorities and as a matter of justice. It is of course true the "pole star" in the construction of wills is to effectuate the intention of the testator, but it is inconceivable to the court that the testator in this case owning an ordinary farm with a small dairy, ever intended to vest in his wife a life estate only, impose upon her the burden of providing a suitable home for his children, clothing, maintaining them in sickness and in health and giving them an education, and then from the income of such property should pay to each one as they arrived at the age of twenty-one years, the sum of $500, and to one the sum of $700 and at her death the property should all belong to the children. No question is raised but that the wife provided a home and cared for the children, but it appears the condition relative to the payments provided for in the

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2d paragraph of the will were not fully complied with by the wife.

It appears the son Harry died a short time after arriving at the age of twenty-one years without having received his $500. The daughter married after arriving at the age of twenty-one years, and subsequently died without receiving her $500. The son Charles is still living but has not received the sum of $700 as provided in the will. The son George Fredenburg it is conceded received $400 of his $500 after arriving at the age of twenty-one years.

The failure to pay the sums as provided in the second condition of the 2d paragraph of the will did not render void the gift to the wife. The sons and the daughter could enforce the payment of the amount due or to which they were entitled under such provision and may enforce the payment against the estate of the deceased wife.

It is, therefore, the conclusion of the court that under the will in question Etta Fredenburg took absolute title to the real and personal property of David Fredenburg, subject to the payment of his debts and the performance of the conditions in the 2d paragraph, and that such absolute estate was not divested, limited or cut down by the subsequent provisions in the succeeding paragraphs of the will.

A decree may be prepared in conformity with the views above expressed and noticed for settlement.

Decreed accordingly.

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## Matter of the Estate of MICHAEL DUFF, Deceased.

(Surrogate's Court, New York County, January, 1921.)

**Transfer tax — what subject to — estates in expectancy — wills — motions and orders — life estates — invalid exercise of power of appointment.**

The will of a decedent, who died in 1904, directed the division of his residuary estate into two parts, the income from one to be paid to his son for life, and on his death the share to pass to his issue. In case no children survived the son, then the income was to be paid to decedent's daughter during her life, and upon her death the share to pass to her issue, and if no issue, then to whomsoever she should appoint by her will. Alternative provision was also made in respect to the other half, the income from which was to be paid to the daughter. She died without issue in 1913, leaving her residuary estate to her brother who died testate in 1918. In an action by the executors of the son for the settlement of his account as trustee under the will of his father, it was held that the attempted exercise by the son, in his will, of the power of appointment given to him under his father's will, was invalid, and that there was a reversion in the estate of the father which passed as if he died intestate, because no provision was made for the disposition of the remainders in case of the failure of the exercise of the power of appointment. It was also held that the powers were contingent because they might be defeated if either of the children of the father died leaving issue. In the transfer tax proceedings in the estate of the father the appraiser found the value of the life estates of the son and daughter, but suspended taxation on the remainders because of the powers of appointment thereover, and the order entered on the appraiser's report contained no reference to the remainders. *Held,* that a contention of the executors of the father's estate that the latter part of section 220(5) of the Tax Law (Laws of 1897, chap. 284) providing for the taxation of the non-exercise of the power in the donee's estate, which was in effect when the father died but repealed by chapter 732 of the Laws of 1911, which was in effect prior to the death of the son, exempted the non-exercise of the power from taxation, could not be sustained, and since no transfer took place in the

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donee's estate the legislature was without power to tax the property in his estate, the transfer tax must be paid on the only transfer effected, which was in the donor's estate; hence the taxation of the estates in expectancy was held in abeyance, and they may be presently taxed against the persons in whom they vested in possession and enjoyment on their full, undiminished value.

An application to vacate an order appointing a transfer tax appraiser on the ground that the estate of the decedent herein was not subject to further transfer tax, treated as a motion to fix the tax without the appointment of an appraiser, and the order entered will provide for vacating the order heretofore made appointing the appraiser.

APPLICATION to vacate an order appointing an appraiser.

Millard F. Johnson, for estate.

William W. Wingate, for State Comptroller.

FOLEY, S. This is an application to vacate an order appointing an appraiser on the ground that the estate of the decedent is not subject to further transfer tax.

Decedent died October 28, 1904. By his will he directed that his residuary estate be divided into two parts, the income from one of which was to be paid to his son John for life, and on his death the share to pass to John's issue. In case no children survived the son, then the income was to be paid to decedent's daughter, Mary, during her life, and upon her death the share to pass to her issue, and if no issue, then to whomsoever she should appoint by her will. Alternative provision was also made in respect to the other half, the income from which was to be paid to decedent's daughter. The daughter, Mary Carey, died without issue in 1913, leaving her residuary estate to her brother, John, who thereafter, and in the year 1918, died testate.

In an action in the Supreme Court by the execu-

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tors of John for the settlement of his account as trustee under the will of his father, Michael Duff, it was held that the attempted exercise by the son in his will of the power of appointment given to him under his father's will was invalid, and that there was a reversion in the estate of the father which passed as if he died intestate, because no provision was made for the disposition of the remainders in case of the failure of the exercise of the power of appointment. *Duff* v. *Rodenkirchen,* 110 Misc. Rep. 575; affd., on opinion below, 193 App. Div 898. The powers were held contingent because they might be defeated if either of the children of decedent died leaving issue.

In the transfer tax proceedings in the estate of Michael Duff the appraiser found the value of the life estates of John J. Duff and Mary Carey, but suspended taxation on the remainders because of the powers of appointment thereover. The order entered on the report contained no reference to the remainders, and was not a binding adjudication as to their liability for present or future taxation. *Matter of Naylor,* 189 N. Y. 556, affg. 120 App. Div. 738; *Matter of Goldenberg,* 187 id. 692. The facts in *Matter of Naylor, supra,* were very much like the facts here. In the opinion of the Appellate Division, first department, it is pointed out that the suspension of the tax on the remainders was not a binding adjudication. In that case also the court held that the remainders should be taxed at their full and undiminished value, notwithstanding that the report of the appraiser taxed the life estates and only indicated the balance remaining after the deduction of the life estates.

The executors also contend that the remainders are in no way taxable because of the varying statutory provisions existing at the date of the death of testator and at the date of death of donee — John Duff. They

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contend that the latter part of section 220, subdivision 5, of the Tax Law (Laws of 1897, chap. 284), providing for the taxation of the non-exercise of the power only in the donee's estate, was in effect in 1904 when Michael Duff died, and that this provision of the statute was repealed by chapter 732 of the Laws of 1911, in effect July 21, 1911, prior to the death of John Duff in 1918. They contend that the repeal exempted the non-exercise of the power. This contention cannot be sustained. The Court of Appeals in *Matter of Lansing,* 182 N. Y. 238, 247, held that this provision was unconstitutional. The court said where there is no transfer "there is no tax * * * the act relating to taxable transfers * * * imposes no direct tax and is unconstitutional since it * * * impairs the obligation of contracts, and takes private property for public use without compensation." I hold, therefore, that this provision was at no time valid or enforcible. That decision must be construed as declaring not taxable the non-exercise of the power by the donee, whether the will of a donor was executed prior or subsequent to the enactment of that provision. Since no transfer took place in the donee's estate the legislature was without jurisdiction to tax the property in his estate. The tax must therefore be paid on the only transfer effected, which was in the donor's estate. Hence the taxation of the estates in expectancy was held in abeyance, and they may now be taxed against the persons in whom they vested in possession and enjoyment on their full, undiminished value. Tax Law, § 230; *Matter of Goldenberg, supra.*

This application may be treated as a motion to fix tax without the appointment of an appraiser, and the order to be entered should provide for vacating the order heretofore made appointing the appraiser.

Decreed accordingly.

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Misc.] Surrogate's Court, New York County, January, 1921.

## Matter of Adoption of JUSTINE R. METZGER, an Infant.

(Surrogate's Court, New York County, January, 1921.)

**Adoption — when application by second husband of mother for adoption of her child will not be granted against the opposition of the father — divorce — husband and wife — Domestic Relations Law, § 111(3).**

The statute (Domestic Relations Law, § 111(3)) still provides that the consent of a parent who has been divorced because of his or her cruelty or adultery is unnecessary in adoption proceedings.

But where in a wife's action for a divorce she was awarded the custody of her six-year-old daughter with provision that the defendant should be entitled to visit her once a week, an application by the husband of the mother for the adoption of the child will not be granted against the opposition of the father, as the effect of granting the adoption would be to terminate, without legal reason, the natural rights of the father.

APPLICATION for the adoption of an infant.

Ephraim Berliner, for petitioner.

Manfred Nathan, for objectant.

FOLEY, S. This is an application for the adoption of an infant female of the age of six years. The petitioner is the husband of the child's mother. The mother secured a divorce from her first husband in this state. The decree of divorce awarded the custody of the child to the mother, but provided that the defendant be entitled to visit his daughter once a week. This application is opposed by the father. Previous to 1913 in adoption proceedings notice was not required to a parent who was divorced for his or her cruelty or adultery. Chapter 569, Laws of 1913,

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amended section 111 of the Domestic Relations Law by providing for the giving of such notice and in such manner to the divorced parent as directed by a judge of a court of competent jurisdiction. The statute (Dom. Rel. Law, § 111, subd. 3) still provides that the consent of a parent who has been divorced because of his or her cruelty or adultery is unnecessary. Upon the return of notice given under the statute has the divorced parent the right to oppose the adoption, although his consent is unnecessary thereto? I think he has. Otherwise the amendment of 1913 to section 111 of the Domestic Relations Law would be without reason or force. Section 113 of the Domestic Relations Law provides that if the judge or surrogate be satisfied that the moral and temporal interests of the person to be adopted will be promoted thereby he must make an order allowing and confirming the adoption, reciting his reasons therefor. The giving of notice to the divorced parent at least enables him to acquaint the court with the absence of such benefits to the child, essential as they are, to enable the surrogate in his discretion to grant or deny the adoption. In this instance the opportunity given the divorced parent justifies the legislative provision for notice. As stated in *Matter of Livingston*, 151 App. Div. 1: "By our statute adoption cannot take place without the consent of the parents of the minor child, unless such parents have forfeited their natural rights to the custody of the child under circumstances clearly defined by the statute itself." The custody and right of visitation of the child were fixed by the decree of divorce. In effect the father's rights were curtailed, not abrogated. Under section 1771 of the Code of Civil Procedure these provisions of the decree of divorce may later be modified in that tribunal, and the father may ultimately be given custody of his daugh-

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ter. The natural rights of the parent to his child are sacred and are jealously guarded by the law. The powers of the state over a child are not superior to the natural rights of the parent. The effect of granting this adoption would be to terminate the natural rights of the father without adequate legal reason and to modify the decree of the Supreme Court. The parties were examined before me at length, and I have carefully considered the different phases of this matter. I am convinced that the interests of the infant will best be served by denying this application. The application is denied.

Application denied.

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## 507 MADISON AVE. REALTY CO., INC., Landlord, v. NICHOLAS MARTIN, Tenant.

(Municipal Court of the City of New York, Borough of Manhattan, Ninth District, January, 1921.)

**Lease — construction of — personal covenants — landlord and tenant — cancellation clause — summary proceedings — evidence.**

If there is any doubt or uncertainty as to the meaning of a lease, it will be construed in favor of the tenant. (P. 318.)

A lease not in terms providing that the conditions and covenants thereof should bind the legal representatives, heirs and assigns of the parties, contained the following:

"Said landlord reserves the right to terminate this lease and the term thereof at any time after May 1, 1920, in case of a *bona fide* sale of the property upon giving 90 days' notice in writing to said tenant, addressed to said demised premises, of his intention to so terminate the same, and this lease and the term thereof shall cease, determine and end at the expiration of 90 days from the day when such notice is given." ***Held,*** that the covenant contained in said clause did not run with the land but was purely personal to the landlord and he having died without having exercised the privilege to terminate

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the lease, it could not be exercised by any subsequent grantee of the premises. (Pp. 317, 318.)

The present landlord in a summary proceeding against the tenant as a holdover after service upon him of the ninety days' notice called for by the lease, having failed to establish that the conveyance of the premises to said landlord by the grantee of the executors of the original landlord, was a *bona fide* sale which would entitle the petitioner to any rights under the cancellation clause, even if it were held that the covenant was one running with the land, the tenant is entitled to a final order dismissing the proceeding upon the merits. (Pp. 320, 321.)

The deposition of the agent of the landlord, who as broker negotiated the lease with the tenant, was inadmissible in evidence, the provision of the lease not being ambiguous. (Pp. 319, 320.)

SUMMARY proceedings.

Myers & Sherwin (David S. Myers, of counsel), for landlord.

Arthur S. Luria (George L. Ingraham, of counsel), for tenant.

GENUNG, J. This is a holdover proceeding brought by the landlord to regain possession of premises on the ground that the tenant is holding over after the expiration of his lease.

The facts are not disputed. They involve the interpretation of the lease under which the tenant is in possession.

On or about December 19, 1912, Simeon J. Drake leased the premises to the tenant herein. Mr. Drake died on October 6, 1914. His executors conveyed the premises on or about August 11, 1915, to a corporation known as 540 Madison Avenue Corporation. This conveyance contained a provision that the premises were conveyed subject to the lease between Mr. Drake and Mr. Martin, the tenant herein. On May 3, 1920, the 540 Madison Avenue Corporation served a notice on

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the tenant that, under paragraph 12 of the lease in question, hereinafter quoted, the tenant was "notified that it is the intention to terminate the term of your said lease, said termination to take effect ninety days from the date of this notice."

Some time after this notice was given and on or about June 22, 1920, the 540 Madison Avenue Corporation assigned the lease to the petitioner in this proceeding.

The interesting legal question involved concerns the said paragraph 12 of the original lease, which reads as follows:

"12. Said *landlord* reserves the right to terminate this lease and the term thereof at any time after May 1, 1920, in case of a *bona fide* sale of the property upon giving 90 days' notice in writing to said tenant, addressed to said demised premises, of *his* intention to so terminate the same, and this lease and the term thereof shall cease, determine and end at the expiration of 90 days from the day when *such notice* is given. And thereafter said *landlord* may re-enter upon and take possession of the demised premises and every part thereof, either by force or otherwise, without being liable to prosecution or damages therefor, and have and enjoy the said premises as of their former estate, free, clear and discharged of this lease and of all rights of the tenant hereunder. In the event of the cancellation of this lease in the manner hereinbefore provided the *landlord* shall pay to the tenant as consideration for the surrender of the said premises the sum of five thousand ($5,000) dollars." (Italics mine.)

It is the contention of the tenant that the privilege of terminating the lease on 90 days' notice was personal to the original landlord, Mr. Drake, and that it did not run with the land, and that inasmuch as Mr.

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Drake died without having exercised the privilege, this privilege necessarily terminated with his death and could not be exercised by any subsequent transferee of the property If this be so, it will follow that the present proceeding cannot be maintained.

The lease does *not* contain any clause providing that the conditions and covenants thereof shall bind the legal representatives, heirs and/or assigns of the parties.

The language used by the parties was clear and unequivocal. It was neither indefinite nor ambiguous. It presents a pure question of law, to wit, the construction of the language thus employed.

It may well be observed preliminarily that in construing a written lease the general rule is that it shall be construed against the grantor and that if there be any doubt and uncertainty as to the meaning of such lease it shall be construed in favor of the grantee. *Smith* v. *Rector,* 107 N. Y. 610, 619. Even irrespective of this canon of construction it is my opinion that the covenant contained in this clause is a purely personal one and does not run with the land. Reeves Real Prop. 833. Consequently the reservation of the right to terminate being one personal to Mr. Drake, it ceased with his death, and could not thereafter be exercised by any subsequent transferee. I cannot find any expressed intent in the entire instrument of lease to give any right to terminate to the landlord's legal representatives or assigns.

In *Bruder* v. *Crafts & D'Amora Co.,* 79 Misc. Rep. 88, the Appellate Term, first department, held that a much similar clause was personal to the original landlord and could not be exercised by an assignee. The court there said, speaking through Lehman, J.: "The original landlord was interested in preserving his right to make a sale free from the incumbrance of any

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lease and has provided in the lease that upon a sale he shall have the right to terminate the lease. When he sold the premises and his immediate assignee accepted them subject to the lease the purpose of this clause had ceased. It is true that the new landlord might prefer to have the premises encumbered only by a lease which he also could terminate, but in the absence of appropriate words giving him such a right I fail to see how we can consider that the right reserved to the original landlord passed also to his assignee."

This ruling was followed in the subsequent case of *Krim Realty Corporation* v. *Varvori,* 97 Misc. Rep. 407, where the Appellate Term, speaking through Shearn, J., held a similar clause, worded even more strongly in the landlord's favor, to be a privilege personal to the original landlord.

The other authorities relied upon by the landlord, including *Childs Co.* v. *Burke,* 110 Misc. Rep. 103, are readily distinguishable, as they all relate to covenants manifestly running with the land, and are so worded and provided, whereas the above-quoted covenant, in my judgment, is merely personal.

At the trial the tenant offered in evidence the deposition of the agent of the lessor, who negotiated this lease as broker with the lessee, to which objection was made by the landlord on the ground that it would tend to alter, vary and contradict the terms of a written instrument. While there are cases in which such a deposition would be admissible to show the intention of the parties (*Thomas* v. *Scutt,* 127 N. Y. 133; *Murdock* v. *Gould,* 193 id. 369; *Smith* v. *Finkelstein,* 162 App. Div. 128), in view of the finding of the court that the provision of the lease is not ambiguous, and clearly indicates the intenton of the parties thereto, the deposition is inadmissible under the authorities. *Imperator*

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*Realty Co.* v. *Tull*, 228 N. Y. 447; *Thomas* v. *Scutt, supra; King* v. *Hudson River Realty Co.*, 210 N. Y. 467.

The provision of the lease in question refers to "a *bona fide* sale." There is no question raised that the sale by the executors of Simeon J. Drake, the original lessor, to the 540 Madison Avenue Corporation, as shown by the deed, dated August 11, 1915, was a *bona fide* sale. But in the mind of the court there is a question as to whether the sale from the 540 Madison Avenue Corporation to the 507 Madison Avenue Realty Co., Inc., was a *bona fide* sale. It appears that on February 5, 1920, the tenant wrote a letter to the 540 Madison Avenue Corporation asking "as to what are the possibilities of having cancellation clause in our lease waived for the balance of our term." On February 7, 1920, the 540 Madison Avenue Corporation wrote to the tenant "that there is no possibility of our waiving the cancellation clause contained in your lease at the present time." On March 18, 1920, the 540 Madison Avenue Corporation made a contract for the sale of the property to the 507 Madison Avenue Realty Co., Inc. On May 3, 1920, the 540 Madison Avenue Corporation served the notice of termination of the lease on the tenant. On May 5, 1920, the 540 Madison Avenue Corporation executed a deed for this property to the 507 Madison Avenue Realty Co., Inc. In other words, after the inquiry by the tenant as to the possibility of waiving the cancellation clause, the owner made a contract of sale to another corporation, and two days after giving notice to the tenant of termination of the lease, the owner delivered the deed to the other corporation, the petitioner in this proceeding. Thereafter the 507 Madison Avenue Realty Co., Inc., brought this proceeding, relying on this transfer as a *bona fide* sale, and claiming it would entitle it to terminate the lease of the present tenant.

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In view of these events the court is of opinion that the landlord has failed to establish a *bona fide* sale which would entitle the present landlord to any rights under the cancellation clause even if it were held to be a covenant running with the land. On this question of fact the court finds in favor of the tenant.

It follows that the tenant is entitled to a final order awarding him possession of the premises and dismissing the petition upon the merits.

Ordered accordingly.

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ADRIENNE L. BOATE, Plaintiff, *v.* GERSHON BOATE, Defendant.

(Municipal Court of the City of New York, Borough of Brooklyn, Second District, January, 1921.)

**Husband and wife — when payment under separation agreement released by divorce.**

Upon entry of the final decree in a wife's action for divorce, the defendant's legal obligation to support her comes to an end and he is released from the payment of any sum due under a separation agreement which did not in terms provide as to the length of time the weekly payments thereunder should continue.

However, the defendant is liable for any payment falling due prior to the entry of the final decree, and plaintiff is entitled to judgment for the amount thereof.

MOTION for a bill of particulars in an action for separation.

William A. Dempsey, for plaintiff.

Martin & Kesselman (David F. Price, of counsel), for defendant.

LAW, J. The case is submitted upon an agreed state of facts. The plaintiff and defendant were husband



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and wife. On or about July 10, 1918, they entered into a separation agreement by which they agreed to live separate and apart from each other during their natural lives. The defendant promised to pay the plaintiff the sum of ten dollars per week for her support and maintenance in the following language of the agreement: "* * * that the said party of the first part shall and will well and truly pay or cause to be paid, for and towards the better support and maintenance of his said wife, the sum of Ten ($10) Dollars per week; the first payment to be made on the date of the signing of this agreement and weekly thereafter, which the said party of the second part does hereby agree to take in full satisfaction for her support and maintenance; * * *." On September 30, 1920, a final judgment of divorce was entered in the Supreme Court, Kings county, in favor of the defendant herein against this plaintiff because of the latter's adultery. The action is to recover sums claimed to have fallen due under the agreement since the entry of the final judgment of divorce, except one weekly payment that fell due prior thereto. The question submitted by stipulation of the parties is whether the entry of the final decree of divorce discharges and releases defendant from the payment of any sum due under the agreement.

I have not been able to find, nor have counsel cited, any decided case directly in point. The plaintiff relies upon the authority of the cases of *Randolph* v. *Field,* 84 Misc. Rep. 403; *Galusha* v. *Galusha,* 116 N. Y. 635, and *Clark* v. *Fosdick,* 118 id. 7. But in none of these cases had a final judgment of divorce been granted the defendant because of the adultery of the plaintiff. In the case of *Randolph* v. *Field, supra,* it was held that in an action by a wife to recover payments alleged to be due under a separation agreement, neither adultery on her part before the separation

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agreement was made, though unknown to defendant, nor her adultery thereafter, is a defense. This case simply adopted the well-settled rule in England as laid down in *Fearon* v. *Earl of Aylesford,* 14 Q. B. Div. 792. The rule is sound, but it rests upon reasons not applicable to the instant case. The obligation of the husband to support and maintain his wife and to pay for necessaries purchased by her is not dependent upon her good conduct, nor upon her fidelity to the marriage vow. He is bound to support her because of the marriage relation. In *Galusha* v. *Galusha, supra,* Judge Parker said: "Because of the marriage relation the husband was bound to support his wife. This legal obligation constituted the basis for a settlement of their affairs, and the making of an agreement by which it should be definitely determined how much he should be obliged to contribute, and she entitled to receive from him, for her support." The separation agreement simply defines to the mutual satisfaction of the parties the husband's legal obligation to support his wife. Hence it follows that he would be liable under such an agreement for the payments therein provided, certainly so long as the marriage relation continued to exist.

In the cases of *Galusha* v. *Galusha, supra,* and *Clark* v. *Fosdick, supra,* it was held that the agreement was not invalidated by a subsequent violation of the marriage vow on the part of the defendant, nor by the granting of a decree of divorce to the plaintiff. Again these cases are clearly distinguishable in principle from the instant case. Where the wife has recovered a final judgment of divorce against the husband, his liability to provide for her support does not cease. The statute empowers the court to require the wrongdoing husband to provide for the support of the wife. The agreement creates an express contractual obliga-

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tion substituted by the act of the parties for the husband's general legal obligation to support and maintain his wife while the marriage relation exists. The express contractual obligation is equally a substitute for his liability to provide for her support by order of the court after she has recovered a judgment of divorce against him. The agreement is a bar to the allowance of alimony. So holding in the case of *Galusha* v. *Galusha, supra,* the court said: "The argument that upon the granting of the decree of divorce there was a failure of consideration to support the agreement is without force." Clearly that would be so.

But in the instant case the husband (defendant) has recovered a final judgment of divorce against the wife, the plaintiff herein. His legal obligation to support her because of the marriage relation has come to an end. The court has no power to require him to pay alimony or in any manner to provide for her support. Unless he is to be held under the naked terms of the agreement, he is as free of obligation to her and of liability to provide for her support as before the marriage relation was contracted. The payments under the agreement would no longer represent any legal or moral obligation whatsoever. And yet it is contended that because there was a consideration for the agreement at the time it was made, the defendant must go on making the weekly payments to the plaintiff for the balance of her life. I cannot subscribe to that view.

That there can be a failure of consideration because of events happening after the making of the separation agreement would seem to have support in the *Galusha* case, above cited. At page 643 the court says: "The consideration for an agreement of separation fails, and the contract is voided when separation does not take place; or where, after it has taken place, the

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parties are reconciled and cohabitation resumed." If the consideration fails where the parties are reconciled and cohabitation resumed, it would seem clear that the consideration would equally fail when the defendant is released from all legal obligation and liability resulting from the marriage relation.

But there is still another ground for holding that the defendant is no longer liable under the terms of the agreement. I think there was an implied condition that the defendant's obligation to make the weekly payments should terminate with his marriage obligation to support the plaintiff and his liability to provide such support by order of the court or otherwise. It will be observed that there is no express provision in the separation agreement as to the length of time the weekly payments shall continue. The agreement does not say that the payments shall be made during the plaintiff's natural life. The plaintiff does agree to take the payments "in full satisfaction for her support and maintenance." It seems clear, then, that it was not within the contemplation of the parties that the defendant's obligations under the agreement would survive a decree of absolute divorce in favor of the defendant because of the plaintiff's adultery. The agreement was in lieu of his legal obligation and liability to provide "support and maintenance," and was so accepted by the plaintiff. If such legal obligation and liability ceased to exist, there would no longer be any just basis for the weekly payments under the agreement, and it is reasonable to presume that the parties contemplated that the operation of the agreement would be limited accordingly. If, from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the defendant's liability to furnish support because of the marriage, the implied condition exists, and it

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is presumed that the contract was made upon such condition and that the parties contemplated the continued existence of the defendant's marriage liability for the support of the plaintiff. *Dexter* v. *Norton*, 47 N. Y. 62–65; *Stewart* v. *Stone*, 127 id. 500. It could hardly have been within the contemplation of the parties that the defendant would go on making the weekly payments for the plaintiff's "support and maintenance" after a decree of absolute divorce had relieved him of the legal liability for which the agreement was a mere substitute.

So far as concerns the payments falling due under the agreement after September 30, 1920, the date of the entry of the final decree of divorce, judgment should be in the defendant's favor. To hold otherwise would shock the common sense of justice. However, I think the defendant would be liable for any payments falling due prior to the entry of the final decree. In her bill of particulars the plaintiff alleges that the defendant "has failed to pay plaintiff the said sum of Ten ($10) Dollars per week from the 25th day of September, 1920 to date." The stipulation of the parties does not in express terms admit the allegations in the plaintiff's bill of particulars, but it is obvious that such was the intention. It appears, therefore, that a weekly payment came due September 25, 1920. The plaintiff is, therefore, entitled to judgment for ten dollars.

Judgment for plaintiff.

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## GUARANTY TRUST COMPANY OF NEW YORK, Plaintiff *v.* JOSEPH MEER, Defendant.

(Supreme Court, New York Special Term, February, 1921.)

**Pleading — when demurrer to complaint sustained — contracts — negotiable instruments — damages — foreign exchange — Personal Property Law, §§ 145, 145(3), 156.**

A complaint alleged a written contract under which plaintiff agreed to sell and deliver to defendant at the city of New York 500,000 French francs, check on Paris, France, at the rate of 8.33 francs per dollar. Within a few days after defendant had notified plaintiff that he repudiated the contract, plaintiff sold the francs in the city of New York at the then current market rate of 16.56 francs per dollar, and as a result of the credit to defendant of the amount realized on such sale, defendant still remained indebted to plaintiff in a certain sum for which judgment was demanded. *Held,* that the measure of damages, in the absence of an allegation of "special circumstances showing proximate damage of a greater amount," was under section 145(3) of the Personal Property Law the difference between the contract price and the market price at the time when the money ought to have been accepted.

It appearing that had plaintiff held the money until the date fixed for its delivery, the loss sustained would have been several thousand dollars less than established by the sale, a demurrer to the complaint on the ground that plaintiff in his demand for judgment had adopted the wrong measure of damages, will be sustained.

MOTION to overrule demurrer.

Frank M. Patterson, for plaintiff.

Jerome, Rand & Kressel, for defendant.

DONNELLY, J. This is a motion to overrule the demurrer interposed by the defendant to the complaint herein on the ground that it does not state facts suffi-

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cient to constitute a cause of action. The complaint in substance alleges that heretofore, and on or about the 9th day of October, 1919, the plaintiff and the defendant entered into an agreement in writing wherein and whereby it was mutually agreed between them that the plaintiff should sell and deliver to the defendant at the city of New York, at any time during July, 1920, at the defendant's option, 500,000 French francs, check on Paris, France, at the rate of 8.33 francs per dollar, for the total sum of $60,024, and that the defendant should accept the same from the plaintiff, and pay therefor said sum of $60,024. That on or about the 23d day of April, 1920, the defendant notified the plaintiff that he repudiated said contract and would not accept said 500,000 francs, or pay therefor, or carry out the terms of said agreement on his part. That the plaintiff was ready and willing to perform said agreement on its part, and would have delivered to defendant the said 500,000 francs, according to the terms of said contract but for the defendant's said repudiation. That on or about the 29th day of April, 1920, and subsequent to said repudiation the plaintiff sold said 500,000 French francs, the amount of said check on Paris, in the city of New York, at the then current market rate of 16.56 francs per dollar, realizing as a result of the sale $30,193.33, and that as a result of the credit of this item to the defendant, the defendant still remained indebted to the plaintiff in the sum of $29,830.77, for which the plaintiff demanded judgment in that amount. The defendant served a demurrer, reciting as its ground that the complaint does not state facts sufficient to constitute a cause of action. Plaintiff, upon receipt of such demurrer, moved to overrule the same and for judgment on the pleadings. The points made by the defendant in support of the demurrer are: (a) That the

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alleged contract comes within the purview and under the provisions of the Personal Property Law of the state of New York, and (b) that the plaintiff has adopted the wrong measure of damages and no facts from which the proper measure of damages can be ascertained are alleged. It has been decided in at least two recent cases that section 85 of the Personal Property Law (Statute of Frauds) applies to the sale of foreign exchange. *Equitable Trust Co.* v. *Keene,* 111 Misc. Rep. 544; *Reisfeld* v. *Jacobs,* 107 id. 1. In the case of *Equitable Trust Co.* v. *Keene, supra,* the court draws the distinction between a "commodity" and a "chose in action," and holds that if the agreement be regarded as one to sell "English pounds" it is covered by the rule that foreign money when dealt in in this country is to be regarded as a commodity; if, on the other hand, it is a contract by the plaintiff to make available to the defendant "a credit of the amount specified at the point specified," then it is an agreement to sell a chose in action, and in either case comes within the provisions of section 85 of the Personal Property Law. While it is true that the Statute of Frauds is not available on demurrer against this complaint — the allegation being that the contract is in writing — yet these decisions are illuminating in showing the trend towards treating these contracts as dealings in commodities or choses in action. The plaintiff contends that the contract in question under the case of *Equitable Trust Co.* v. *Keene* constitutes a sale of a chose in action, and that by section 156 of the Personal Property Law a chose in action is expressly excluded from the purview and application of section 145 of the Personal Property Law, which is the only section of that law germane to the ground of "improper measure of damages" raised by the demurrer. For the purposes of this

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motion I am willing to agree with the contention of the plaintiff to the extent of holding that the contract in question is one for the sale of a chose in action, and that section 145 of the Personal Property Law, as modified by section 156 of that act, does not apply to this sale. The plaintiff, however, insists that neither the rule of damages as contained in the Personal Property Law, nor as stated at common law, and which is supposed to be codified by section 145 of the Personal Property Law, applies to this particular transaction; that the instant case is one of first impression, and that the court should evolve a new measure of damages to meet the exigencies of this class of cases, and that the new measure of damages should be predicated upon the idea that foreign exchange is perishable in nature, and that therefore a vendor of foreign exchange in case of an anticipatory breach by the vendee is under a duty at the time of the breach to sell the foreign exchange at once in order to mitigate the loss of the vendee. The plaintiff further suggests that this new rule of damages should be based on logic and reason. I see no necessity for a new measure of damages to compute the loss arising out of an anticipatory breach of the sale of foreign exchange. The sale of foreign exchange runs into millions every year in this city, the same as the sale of other objects of sale, and there is no reason that I know of why it should have exclusive safeguards. The claim that foreign exchange is perishable is not borne out by the business generally, nor the instant case in particular. Perishable goods in the very nature of things continue to decline in value as time advances, and are in imminent danger of being rendered valueless. Foreign exchange may enhance in value in the future as well as decline, and in the transaction alleged in this complaint had the plaintiff held the francs until the date

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of the delivery, July 31, 1920, the loss sustained by the defendant would have been $9,000 less than was established by the sale on April 29, 1920, the date of the breach. In my opinion, whether the contract is treated as one for the sale of a commodity or one for the sale of a chose in action, the measure of damages for an anticipatory breach would be the same. If treated as a commodity, section 145 of the Personal Property Law would apply, and the provisions of this section are merely declaratory of the common law, and if treated as a chose in action, the rules of damage as stated at common law would obtain. Section 145 of the Personal Property Law provides as follows: "Action for damages for nonacceptance of the goods. 3. Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept." There is no claim alleged or advanced by the plaintiff of " special circumstances showing proximate damage of a greater amount." The common-law rule in the case of an anticipatory breach of a contract of sale of goods including the ordinary measure of damages is stated in *Windmuller* v. *Pope,* 107 N. Y. 674, as follows: " The defendants having on the 12th of June, 1880, notified the plaintiffs that they would not receive the iron rails, or pay for them, and having informed them on the next day that if they brought the iron to New York they would do so at their own peril, and advised them that they had better stop at once attempting to carry out the contract, so as to make the loss as small as possible, the plaintiffs were justified in treating the contract as broken

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by the defendant at that time, and were entitled to bring the action immediately for the breach, without tendering the delivery of the iron, or awaiting the expiration of the period of performance fixed by the contract; nor could the defendants retract their renunciation of the contract after the plaintiffs had acted upon it and, by a sale of the iron to the other parties, changed their position (cases cited)." The ordinary rule of damages in an action by a vendor of goods and chattels for a refusal by the vendee to accept and pay for them is the difference between the contract price and the market value of the property at the time and place of delivery. The plaintiff may claim, however, on account of the fluctuation of the market in foreign exchange that it was the duty of the plaintiff to sell these French francs at the time of the breach in order to mitigate the loss. This situation is disposed of by the case of *Saxe* v. *Penokee Lumber Co.*, 159 N. Y. 371, where the court at page 378 said: "'There is another pertinent rule of damages, that the party who suffers from a breach of contract must so act as to make his damages as small as he reasonably can.' A just rule, indeed, and applied wherever needful, but one wholly without practical application to a case where the subject matter of the contract has a market value at the time and place of delivery." The motion to overrule the demurrer is denied, and the demurrer is sustained on the ground that the plaintiff has adopted the wrong measure of damages in demanding judgment.

Ordered accordingly.

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THEODORE B. HENNENLOTTER, Plaintiff, *v.* DOLORES QUINTANILLA DE ORVANANOS, Defendant.

(Supreme Court, Kings Trial Term, February, 1921.)

**Negotiable instruments — check drawn in Mexico and payable in New York on condition considered to be a Mexican transaction — when defendant entitled to judgment.**

A check written in the Spanish language and payable in dollars in New York city, was made by defendant, a firm of bankers in Mexico, and there delivered to the payee upon the condition in writing that if a draft given to defendant by the payee at the time, was not paid, the check was to be void and of no value. The draft was not paid, and payment of the check was stopped. In an action on the check, which came to plaintiff's assignor by indorsements made in Mexico, defendant pleaded a breach of the condition upon which the check was given, and all the facts showed that the case presented a Mexican transaction as to all parties except the drawee of the check. *Held*, that New York law does not apply and defendant is entitled to judgment.

ACTION on two instruments for the payment of money.

Bonynge & Bonynge (Paul Bonynge, of counsel), for plaintiff.

Stewart & Shearer (McCready Sykes, of counsel), for defendant.

LAZANSKY, J. Action on two instruments for the payment of money similar in form to and conceded to be checks such as are commonly used in this state. The checks were executed and delivered in Mexico " to the order of " a person named, payable in dollars in New York city by a firm conceded to be bankers and were written in the language used in Mexico. They came to plaintiff's assignor by indorsements made in

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Mexico. These indorsements were in the form used in this state in the usual course of negotiation. The checks, with others, were delivered to the payee upon the condition in writing that if two drafts given to the defendant at the same time by the payee were not paid then the checks were to be void and of no value. The drafts were not paid and defendant stopped payment of the checks in suit. As a defense, defendant pleads breach of the condition. If the laws of this state be applicable to the obligation of the drawer of the checks, the defense is not good, because plaintiff's assignor is a holder for value in due course. If, however, the laws of Mexico apply, then the defense is valid. According to the testimony, in Mexico these checks are not negotiable and would be subject to the defense. There a check may be payable to an individual and is not negotiable. A check payable to the order of a person or a person or order is unknown to Mexican law. A check may be payable to bearer and is negotiable by delivery. If the checks were deemed bills of exchange or drafts as known here, they would not be negotiable in Mexico, because, as testified, they do not contain certain items essential to such instruments under the law, and, therefore, would be merely choses in action or "credits" and subject to the defense. Do the laws of New York or Mexico apply? The obligation of the drawer of a bill of exchange is determined by the law of the place where he delivered it. *Amsinck* v. *Rogers,* 189 N. Y. 252. It might be interesting to consider the proposition that a check is practically the same as a bill of exchange (which has been the subject of discussion by the courts and text book writers) and, therefore, the rule stated should be applied here. But that need not be discussed in light of the conclusion reached. While it was not necessary to the decision in that case,

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the court in *Amsinck* v. *Rogers, supra,* states as a rule laid down in *Hibernia National Bank* v. *Lacombe,* 84 N. Y. 367, that the obligation of the drawer of a check is determined by the law of the place where it is payable. In thus stating this rule the court in the *Amsinck* case was but differentiating the case of a bill of exchange from that of a check. However, it is so stated that it would seem to be a confirmation of what the court says the *Hibernia National Bank* case does hold. Under these circumstances, despite the general rules laid down in *Union National Bank* v. *Chapman,* 169 N. Y. 538, it would be necessary to hold in this case that the law of New York is applicable, were it not that the court in the *Amsinck* case seems to have overlooked the effect in this respect of section 321 of the Negotiable Instruments Law which provides: " Check defined — A check is a bill of exchange drawn on a bank payable on demand." See *Casper* v. *Kuhne,* 79 Misc. Rep. 411. This section was discussed in the *Amsinck* case on a question of whether the instrument under consideration was a check or a bill of exchange. But as to whether it changed the law as the court in the *Amsinck* case says it was held in the *Hibernia National Bank* case was not the subject of consideration. The Negotiable Instruments Law was not in existence at the time of the decision in the *Hibernia National Bank* case. Uniformity of rules was one of the reasons for the adoption of this legislation. To apply the rule of the *Amsinck* case to a check makes for uniformity and ends a seeming difference which existed with but little, if any, impressive reason. It will, therefore, be held that the Mexican law is applicable. Because the checks were drawn on a form common to our state and unknown to Mexican law and because 100 of them came to the hands of plaintiff's assignor by

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negotiation in form usual in New York, it is argued defendant is estopped to deny that New York law is applicable. But plaintiff's assignor was not led to believe by any acts of defendant that she would not assert a defense to the checks, if one she had, as she would have the right under the Mexican law. Even if she knew the checks had been negotiated as checks are here negotiated, of which there is no proof, she never indicated that she would not assert her rights under the Mexican law. There is no proof that she knew the significance of the form of the checks. There is no estoppel to be invoked against defendant. It is also insisted that the form of the check and the manner of the negotiation of other of defendant's checks, which reached plaintiff's assignor, indicated an intention of defendant to have the New York law apply. In the first place there is no proof that she knew of the significance of the form of the check and there is no proof that she knew how others issued by her had been negotiated. Defendant knew the checks in the case were payable in New York. But in light of the condition on which they were issued to the payee, how can it be said she intended the laws of New York to apply? Such an intention would have made the conditional agreement an idle transaction. Besides the facts in the case show it was a Mexican transaction as to all parties except the drawee. There will be judgment for defendant.

Judgment for defendant.

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Matter of the Application of JAMES K. O'CONNOR, Individually and as Mayor of the City of Utica, and the CITY OF UTICA, for a Writ of Prohibition, Relators, *v.* THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK FOR THE SECOND DISTRICT, and NEW YORK STATE RAILWAYS, Defendants.

(Supreme Court, Schoharie Special Term, February, 1921.)

**Writ of prohibition — city of Utica — street railways — increase of fare — public service commission — franchises — when motion for alternative** writ of prohibition denied.

The New York State Railways, a domestic corporation operating street surface railroads, among other places, in the city of Utica, having instituted a proceeding before the public service commission for permission to increase its rate of fare, the city, as a basis of demand for an alternative writ of prohibition commanding said corporation and the public service commission to desist from further proceedings in the matter, set up as a bar to the jurisdiction of the public service commission, sixteen franchises granted by the city between May 6, 1886, and January 18, 1907, to said corporation, or its predecessors in interest, all of which franchises were without limitation except that the railway corporation would obey the Railroad Law, including any changes in the rate of fare made by the legislature or its delegated agent, the public service commission. *Held,* that the motion for the alternative writ of prohibition must be denied.

APPLICATION for an alternative writ of prohibition directed to the public service commission of the state of New York for the second district, and the New York State Railways, commanding them and each of them to desist and refrain from any further proceedings in the matter of the application of the New York State Railways, now pending before the said public



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service commission, for permission to increase its rate of fare to ten cents in the city of Utica.

Fred F. Scanlan, corporation counsel, for relator.

Kernan & Kernan (Warnick J. Kernan, of counsel), for defendant New York State Railways.

No appearance for public service commission.

NICHOLS, J. The New York State Railways is a domestic corporation operating street surface railroads, among other places, in the city of Utica, N. Y. Between May 6, 1886 and January 18, 1907, there was granted to it or to its predecessors in interest by the city of Utica, sixteen franchises which are now set up as a bar to the jurisdiction of the public service commission in the proceeding which has been instituted by the New York State Railways for an increased rate of fare and are made the basis of the demand of said city for an alternative writ of prohibition directed to the public service commission of the second district and the New York State Railways, commanding them and each of them to desist and refrain from any further proceedings in the matter of the application of the said New York State Railways for permission to increase its rate of fare.

Six of the aforesaid franchises contain a statement incorporated therein either to the effect that the application is granted and franchise given, " upon the express condition that the provisions pertinent thereto of the Act of the Legislature of the State of New York, passed May 6th, 1884 entitled 'An Act to provide for the construction, extension, maintenance and operation of street surface railroads and branches thereof in cities, towns and villages,' and all acts amendatory thereof or supplemental thereto be in all things com-

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plied with" or that the consent "is given pursuant to the provisions of chapter 252 of the Laws of 1884 * * * and the acts amendatory thereof * * *." Hereinafter in this opinion, these six franchises will be referred to as "B" franchises, the term "B" being used for convenience of reference to said franchises and for another reason which will appear later in this opinion.

Ten of the said sixteen franchises mentioned contain a statement that the said consent is given on the following express conditions, to wit: "That the provisions of article IV of the Railroad Law pertinent thereto shall be complied with," which said ten franchises will be hereinafter referred to as "C" franchises for convenience of reference thereto and for another reason which will hereinafter appear.

Chapter 252 of the Laws of 1884, which was an act to provide for the construction, extension, maintenance and operation of street surface railroads and branches thereof in cities, towns and villages, provided in section 13 thereof that "No company or corporation incorporated under, or constructing and operating a railroad * * * shall charge any passenger more than five cents for one continuous ride * * *" and section 4 of said act provided "The consent of the local authorities shall in all cases be applied for in writing, and when granted shall be upon the express condition that the provisions of this act pertinent thereto shall be complied with, and shall be filed in the office of the county clerk of the county in which said railroad is located." Section 19 of said act provides, "The legislature may at any time alter, amend or repeal this act."

Chapter 65 of the Laws of 1886 (which went into effect March 22, 1886, before any of the franchises herein were granted) amended chapter 252 of the

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Laws of 1884 by the inclusion of a provision to the effect that: "The Legislature expressly reserves the right to regulate and reduce the rate of fare on such railroad or railway;" and afterwards, the General Railroad Law (Laws of 1890, chapter 565), by section 101 provided: "The legislature expressly reserves the right to regulate and reduce the rate of fare on any railroad constructed and operated wholly or in part under such chapter (chapter 252, Laws of 1884) or under the provisions of this article."

Section 5, subdivision 3 of the Public Service Commissions Law provides: "3. All jurisdiction, supervision, powers and duties under this chapter not specifically granted to the public service commission of the first district shall be vested in, and be exercised by, the public service commission of the second district, including the regulation and control of all transportation of persons or property, and the instrumentalities connected with such transportation, on any railroad other than a street railroad from a point within either district to a point within the other district."

Section 181 of the Railroad Law (Cons. Laws, chap. 49), so far as material here, is as follows: "No corporation constructing and operating a railroad under the provisions of this article, or of chapter two hundred and fifty-two of the laws of eighteen hundred and eighty-four, shall charge any passenger more than five cents for one continuous ride from any point on its road, or on any road, line or branch operated by it, or under its control, to any other point thereof, or any connecting branch thereof, within the limits of any incorporated city or village. * * * The legislature expressly reserves the right to regulate and reduce the rate of fare on any railroad constructed and operated wholly or in part under such chapter

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or under the provisions of this article; and the public service commission shall possess the same power, to be exercised as prescribed in the public service commissions law."

Subdivision 1 of section 49 of the Public Service Commissions Law is in part as follows:

"§ 49. Rates and service to be fixed by the commission. 1. Whenever either commission shall be of the opinion, after a hearing had upon its own motion or upon a complaint, that the rates, fares or charges demanded, exacted, charged or collected by any common carrier, railroad corporation or street railroad corporation subject to its jurisdiction for the transportation of persons or property within the state, or that the regulations or practices of such common carrier, railroad corporation or street railroad corporation affecting such rates are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in any wise in violation of any provision of law, or that the maximum rates, fares or charges, chargeable by any such common carrier, railroad or street railroad corporation are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the commission shall with due regard among other things to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservation out of income for surplus and contingencies, determine the just and reasonable rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed, notwithstanding that a higher rate, fare or charge has been heretofore authorized by statute, and shall fix the same by order to be served upon all common carriers, railroad corporations, or

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street railroad corporations by whom such rates, fares and charges are thereafter to be observed."

In *Matter of International Railway Company* v. *Public Service Commission*, 226 N. Y. 479, the court says: "The power to regulate rates is the power to increase them if inadequate just as truly as it is the power to reduce them if excessive." The court saying, at page 478: "This is a case where the local authorities, in imposing a condition, have consented that the legislature may change it, and have thus renounced the right of forfeiture or revocation that might otherwise be theirs. 'Nothing in this contract contained shall be construed to prevent the legislature from regulating the fares of said companies, or either of them.' In the light of this provision, amendment by legislation must be held to have been as much within the contemplation of the parties as amendment by agreement," and again at page 479: "The situation then, is this: Municipality and railroad have joined in the declaration that the rate fixed by their agreement shall be, not final, but provisional. It is to be subject, in case of need, to re-examination and readjustment by the agents of the state. The need that was foreseen as possible, has arisen. In upholding the jurisdiction of the commission to deal with it, we do not override the conditions of the franchise. We heed and enforce them. There are times when the police power modifies a contract in spite of the intention of those who have contracted. Here its action is in aid of their intention. The covenant which limits rates is a condition of the consent, but only in equal measure with the covenant preserving and defining the power of amendment. So far as the power of the commission is concerned, the result is the same as if no condition had been imposed at all."

All of the "B" franchises were granted between

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May 6, 1886, and October 11, 1889; while th franchises were all granted between the 4th October, 1895, and January 18, 1907. So tha franchises "B" and "C" were granted January 1, 1875, and July 1, 1907.

In *People ex rel. Garrison* v. *Nixon,* 229 N. 586, Crane J., in a dissenting opinion, says: " think this right of the public service commi regulate fares rests upon that clause of the fr making the Railroad Law (Consol. Laws, C. 4 thereof. The franchises are granted upon c that the railroad shall comply with the provi the Railroad Law which includes section 18 referred to. The franchises in the *Quinby* c contain a similar provision. They were con upon compliance with article 4, chapter 39 of eral Laws of the state of New York of 1892. contained section 101 which later became sec of the Railroad Law. As above stated, sec reserved the right in the legislature to regula In deciding the *Quinby* case we did not cons of sufficient importance to control our decisi

The franchises in *Matter of Quinby* v. *Pub ice Commission,* 223 N. Y. 244, and in *Matter of Niagara Falls,* 229 id. 333, besides the pr required by chapter 252 of the Laws of 1 section 101 of the Railroad Law, contained a provision limiting the rate of fare to be cha the sum of five cents.

In *People ex rel. Garrison* v. *Nixon, supra,* t of Appeals in a *per curiam* opinion, amor things say: "We think that the following cl franchises fall outside the scope of our dec *Matter of Application of the City of Niagara Public Service Commission of the State of N for the Second District* and the *International*

*Company* (decided herewith), 229 N. Y. 333; *Matter of Quinby* v. *Public Service Commission*, 223 N. Y. 244. * * * 4. The following franchises granted between January 1, 1875 and July 1, 1907: (a) * * *. (b) The franchise granted in and by the consent of the common council of the city of Brooklyn to the Prospect Park and Coney Island Railroad dated December 21, 1885, consenting to the construction of a line on Park avenue and other streets in Brooklyn. (c) The franchise granted in and by the consent of the common council of the city of Brooklyn to the Nassau Electric Railroad Company, dated June 19, 1893, covering a number of lines as therein stated."

In the exception (b) above quoted, the franchise contains the following condition: " Provided that this consent is granted upon the express condition that the provisions of chapter 252 of the Laws of 1884, of the State of New York, entitled 'An Act to provide for the construction, extension, maintenance and operation of street surface railroads and branches thereof in cities, towns and villages,' pertinent thereto, shall be complied with; and shall be filed in the office of the county clerk of the county of Kings; provided, also, that this consent is given to said The Prospect Park and Coney Island Railroad Company subject to all the obligations, liabilities and payments and all the rights, privileges and franchises provided for by the aforesaid act."

The language of the franchise of the exception " (b) " being substantially identical with the language of the franchises " B " and in the exception " (c) " above quoted, the language of the franchise is as follows: " This consent is granted upon the express condition that the provisions of Article IV, of Chapter 565, of the Laws of 1890, and the Acts amendatory thereof, shall be complied with. This consent is

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granted subject to all the obligations and liabilities and all the rights, privileges and franchises provided for by the aforesaid Act," being substantially the same provision as contained in the " C " franchises except that the words " and the Acts amendatory thereof " having been added to the exception (c).

While the Court of Appeals in *People ex rel. Garrison* v. *Nixon, supra,* only excepted three express franchises named therein, granted between January 1, 1875, and July 1, 1907, by a parity of reasoning it must follow that franchises like the " B " and " C " franchises hereinbefore mentioned and which contain no limitations except that the said railway corporation would obey the Railroad Law, including any changes in the rate of fare made by the legislature or its delegated agent, the public service commission, also fall within the exceptions " (b) " and " (c) " mentioned in *People ex rel. Garrison* v. *Nixon, supra.*

The motion for an alternative writ of prohibition must be denied, with ten dollars costs.

Motion denied, with ten dollars costs.

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B. BERMAN, INC., Plaintiff, *v.* AMERICAN FRUIT DISTRIBUTING COMPANY OF CALIFORNIA, Defendant.

(Supreme Court, Erie Special Term, February, 1921.)

**Process — service by publication — where papers must be mailed — when motion to vacate judgment granted — Code Civ. Pro. § 440.**

**Motions and orders — when defendant's motion for order of restitution denied — attachment — foreign corporations.**

Service of an order of publication, together with the summons and complaint, by depositing the papers, contained in a securely closed postpaid wrapper, in a letter-box other than in the post-office, is not good.

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Where an order for the service of the summons directed that a copy of the summons and complaint and order of publication, contained in a securely closed postpaid wrapper, be deposited in the post-office as required by section 440 of the Code of Civil Procedure, but upon application for judgment the only proof of mailing was an affidavit stating that the papers were deposited in a depositary maintained by the United States government in a privately owned building, the defect is jurisdictional and not merely an irregularity, and defendant's motion to vacate the judgment will be granted.

Defendant, a foreign corporation, which did not appear in the action, has no property within this state and is not doing business therein, delayed making the motion to vacate the judgment for nearly a year. *Held*, that as in the event of granting defendant's motion for an order of restitution of its property taken by virtue of a warrant of attachment, plaintiff's only relief would be to institute proceedings in the state of defendant's residence, the motion will be denied.

MOTION by defendant to set aside judgment and for order directing restitution of property taken on warrant of attachment.

Lawrence & Lathrop, for motion.

Walter C. Newcomb, opposed.

BROWN, J. The order for service of the summons directed that "the plaintiff shall deposit in the post-office at the City of Buffalo, County of Erie and State of New York a copy of the summons and complaint and of this order, contained in a securely closed post-paid wrapper, directed to the defendant," etc. The only proof of such required mailing presented upon application for judgment was by affidavit stating: "That on the 23rd day of July, 1919, deponent deposited in a depositary maintained by the United States Government in the D. S. Morgan Bldg. in the City of Buffalo, New York, a copy of a summons, complaint, affidavits and order for publication, copies of

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which are hereto annexed, contained in a secu
duly prepaid wrapper directed to the defenda

Section 440 of the Code of Civil Procedure ]
that the order of publication "must also
* * * a direction that, on or before the da
first publication, the plaintiff deposit in a po
branch post-office or post-office station, one
sets of copies of the summons, complaint an
each contained in a securely closed post-paid v
directed to the defendant," etc.

In *Korn* v. *Lipman,* 201 N. Y. 404, it was h
the mailing of a summons, complaint and or
post-office box regularly maintained by the
ment of the United States and under the ca
post-office authorities at the borough of Ma
city of New York, which post-office box was
chute which extended from one of the upper
of the Home Life Insurance Building at
Broadway, in the borough of Manhattan, city
York, to a United States post-office box loc
the ground-floor corridor of said building, w
mailing of the summons, complaint and orde
post-office. To the same effect is the holding i
*Ulrichs,* 136 App. Div. 809, and *Von Der E*
*Ditmars,* 174 id. 390.

It is urged by the defendant that the provi
the statute authorizing the order of public
direct a mailing at "a post-office, branch post-
post-office station" permits of a mailing at th
ing post-office letter box maintained by the
ment in the D. S. Morgan Building; that suc
receiving box is a post-office station. Such
undoubtedly does authorize such mailing at an
several post-office substations maintained in
of Buffalo, but to say that a letter box in tl
Morgan Building is a post-office station overl

patent fact that the legislature, by sections 797 and 802 of the Code of Civil Procedure, have specifically provided that the privilege of serving some kinds of papers by mailing the same in the post-office or in any post-office box regularly maintained by the government of the United States and under the care of its post-office shall not apply to the service of a summons or other process. In *Schwartz* v. *Schwartz,* 113 Misc. Rep. 444, the summons was mailed in a mail box at 280 Broadway; the learned justice saying: "Judicial notice cannot be taken that this mail box was one authorized or maintained under the provisions of the postal laws. The case may be re-opened and the necessary proof, if it exists, supplied." The necessary proofs referred to must have been proof that the mail box at 280 Broadway was a post-office, branch post-office or post-office station, for it is only at such places that a summons, etc., can be mailed under section 440 of the Code of Civil Procedure. The mere fact that the box was a mail box authorized or maintained under the provisions of the postal laws does not make it a post-office, branch post-office or post-office station.

It may be that the meaningless statement in the alleged proof of mailing, viz., "contained in a securely and duly prepaid wrapper" should be treated as an irregularity and an opportunity be given to prove that the summons, etc., was contained in a securely closed post-paid wrapper; but it is clearly apparent that the failure to prove that the papers were mailed at a post-office, branch post-office or post-office station is jurisdictional and not a mere irregularity.

The defendant's motion to vacate and set aside the judgment must be granted. The proved fact that the defendant is indebted unto the plaintiff in a substantial sum not being denied, defendant not appearing in the action, having no property within the state,

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not doing business within the state, having making this motion for nearly one year, pl only remedy for relief in the event of an o restitution being to institute proceedings i fornia, such order will not be made.

Ordered accordingly.

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INTERNATIONAL RAILWAY COMPANY, Plaintiff, v PICKARSKI and ELLA C. HEINZ, Defenda

(Supreme Court, Erie Equity Term, February, 19

**Judgments — joint tort feasors — when payment of jud attorney not a satisfaction — assignments — eviden**

It is only when one of several joint tort feasor debtors pays the judgment that it is satisfied as to a

The mere fact that the attorney for one of the debtors, without the knowledge of his client, pays t of the judgment to the judgment creditor and takes ment thereof to a third person, is no proof that the was to satisfy the judgment. Nor is the fact that t ment was made for the purpose of collecting the judg the other joint judgment debtor proof that the pay made in satisfaction of the judgment.

A stranger may purchase a judgment without not party to it and thus acquire all the rights of the creditor.

The authority of the attorney of an unsuccessful ceases with the entry of judgment against him.

While the property of one of two joint tort feasor debtors was under a levy made under an execution the judgment, one who had been his attorney in t without the knowledge of either of the judgment debt tarily paid the judgment from his own money, took ment of the judgment to his stenographer, and after tion had been withdrawn and the levy released, he iss execution on the judgment against the property of judgment debtor. *Held*, that such payment was n faction of the judgment.

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In the absence of proof that the attorney acted for his former client or even sustained the relation to him of attorney at the time of making payment, the proof being that his former client made no request that the judgment be paid, there was no presumption that said attorney acted in the matter as attorney for his former client, and the complaint in an action by the other judgment debtor, to restrain the collection of the judgment, will be dismissed.

ACTION to restrain the collection of a judgment, etc.

Penney, Killeen & Nye, for plaintiff.

Loomis & Gibbs, for defendants.

BROWN, J. On June 10, 1919, judgment was entered in Erie county clerk's office in favor of Alexandra Majchrowska against plaintiff and defendant Pickarski as joint tort feasors for the recovery of damages incurred by Majchrowska through the joint negligence of the plaintiff and defendant Pickarski. Upon an execution issued on the judgment the sheriff of Erie county levied upon the property of the defendant Pickarski to satisfy the same. On July 29, 1919, while the property of the defendant Pickarski was subject to the levy, the attorney for Pickarski, without the knowledge of Pickarski, paid to the plaintiff in the execution, Majchrowska, the amount of the judgment, interest and costs, and induced Majchrowska to assign the judgment to the defendant Heinz, who was a stenographer in the office of the attorney for Pickarski. The money for this payment was the money of the attorney and was paid to Majchrowska for the twofold purpose of preventing any of the money reaching the hands of the attorney for Majchrowska and also for the purpose of releasing the property of Pickarski from the levy under the execution and col-

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lecting the judgment from the plaintiff railway company, the joint tort feasor and judgment debtor with Pickarski. After the assignment of the judgment to the defendant Heinz the execution was withdrawn and the property of the defendant Pickarski released from the levy; thereupon and on August 1, 1919, the attorney for Pickarski, acting for the defendant Heinz, procured a new execution to be issued upon the judgment directing a levy to be made thereunder upon the property of the plaintiff railway company, for the satisfaction of the judgment, money realized therefrom to be paid to the defendant Heinz. In pursuance of the execution the sheriff of Erie county levied upon the property of the plaintiff railway company, whereupon this action was commenced for relief. The question is whether, under the circumstances, the payment of the moneys by the attorney for Pickarski was a satisfaction of the judgment.

The law undoubtedly is that the payment of the amount of the judgment by one of two joint tort feasor judgment debtors to the judgment creditor is a payment by both joint tort feasors and satisfies the judgment. *Harbeck* v. *Vanderbilt,* 20 N. Y. 395; *Lillie* v. *Dannert,* 232 Fed. Repr. 104.

If the attorney for Pickarski had paid the money at the request of Pickarski the judgment undoubtedly would have been satisfied. *Gotthelf* v. *Krulewitch,* 153 App. Div. 746.

The attorney for Pickarski voluntarily paid the amount of judgment without knowledge of either judgment debtor and took an assignment to his stenographer. The fact of taking the assignment has been held to be evidence that the money was not paid in satisfaction of the judgment when the payment is made by a stranger not a party to the record. *Dow-*

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*ling* v. *Hastings,* 211 N. Y. 202; *Harbeck* v. *Vanderbilt,* 20 id. 395.

There seems to be no question but that the attorney for Majchrowska could have withdrawn the execution against Pickarski and a levy have been made on that execution upon the property of the plaintiff railway company. It is only when one joint tort feasor judgment debtor pays the amount of the judgment that it is satisfied as to all defendants.

The reason that such a payment of money satisfies the judgment and cannot be the basis of an assignment, even though in fact an assignment be executed and delivered, is that the judgment, being a joint liability of the judgment debtors when owned by the judgment creditor, ceases to be a joint liability when owned by one of the joint judgment debtors. A judgment debtor could not own a judgment against himself. The owner of the fee cannot purchase, own and keep alive a mortgage upon his own land; the mortgage is merged in the fee and ceases to exist as a mortgage. The same theory destroys the judgment when a judgment debtor pays its amount and has it assigned to himself. As was said in *Harbeck* v. *Vanderbilt,* 20 N. Y. 397: "Where one of several defendants against whom there is a joint judgment, pays to the other party the entire sum due, the judgment becomes thereby extinguished, whatever may be the intent of the parties to the transaction. It is not in their power, by any arrangement between them, to keep the judgment on foot for the benefit of the party making the payment. If, therefore, in such a case, the latter take an assignment to himself, or, unless under special circumstances, even to a third person for his own benefit, the assignment is void and the judgment satisfied. It is equally clear, that if the money be paid, not by one who is a party to the judgment and liable upon

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it, but by some third person, the judgment will be extinguished or not, according to the intention of the party paying. The taking of an assignment, whether valid or void, affords under all circumstances, unequivocal evidence of an intention not to satisfy the judgment."

The mere fact that the attorney for one of the judgment debtors, unknown to his client, pays the amount of the judgment to the judgment creditor and takes an assignment of the judgment to a third person, is not proof that the judgment was intended to be satisfied; nor does the fact that the attorney for one of the judgment debtors had such an assignment made for the purpose of collecting the judgment from the other judgment debtor prove that the payment was made in satisfaction of the judgment.

A finding cannot be made on the record that it was intended by the attorney for Pickarski that the judgment would be satisfied by his payment to Majchrowska. It has long been the law that a stranger may purchase a judgment without notice to any party to it, and thus acquire all the rights of the judgment creditor.

The authority of an attorney for an unsuccessful defendant ceases with the entry of judgment against him. *Lusk* v. *Hastings*, 1 Hill, 656; *Cruikshank* v. *Goodwin*, 20 N. Y. Supp. 757; *Davis* v. *Solomon*, 25 Misc. Rep. 695. With no proof that the attorney who had acted for Pickarski up to the time of the entry of the joint judgment, acted as attorney for Pickarski or even sustained the relation of attorney to him at the time of making the payment, and with the unchallenged direct evidence that Pickarski furnished no part of the money, made no request that such money be paid and had no knowledge of the transaction, the presumption that such attorney acted as attorney of



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Pickarski cannot be indulged in. Upon the proofs presented, the inference that the attorney was not a stranger to the judgment at the time he paid the money and took the assignment does not arise. The defendants must have judgment dismissing the complaint.

Judgment for defendants.

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JOSEPH SCHUBACH, Plaintiff, *v.* PINKUS KONSHNER, Defendant.

(Supreme Court, Erie Equity Term, February, 1921.)

**Statute of Frauds — sale of real estate — insufficient memorandum — contracts — specific performance — when complaint dismissed.**

Where by an oral contract for the purchase of real estate it was agreed that the balance of the purchase price, after certain cash payments, should be paid by plaintiff assuming an existing mortgage on the property and giving a mortgage for the difference, a writing which while acknowledging receipt of the cash payment, did not specify the terms of the mortgage to be given, how long it was to run or the rate of interest, is an insufficient memorandum under the Statute of Frauds and the complaint in an action for specific performance of the contract will be dismissed, but without costs.

ACTION for specific performance.

Corcoran & Corcoran, for plaintiff.

Leo F. Donnelly, for defendant.

WHEELER, J. This action is brought to enforce specific performance of a contract for the sale of certain premises known as 906 Sycamore street in the

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city of Buffalo, N. Y. After some negotiations the plaintiff paid the defendant $100 on account of the purchase price of the property, and the defendant gave the plaintiff the following written receipt:

"BUFFALO, N. Y., *Nov.* 28, 1918.

"Received of Joseph Schubach One hundred Dollars, deposit on property 906 Sycamore Street, Purchase price $5,500 payable as follows: $900 or more April 1, 1920, and mortgage given and assuming for $4,500.

"$100. PINKUS KONSHNER."

The defendant Konshner shortly after left the $100 paid at the plaintiff's house and refused to convey the property. The action is to compel specific performance. The principal defense is that the contract does not comply with the requirements of the Statute of Frauds.

Section 259 of the Real Property Law of the state reads:

"*When contract to lease or sell void* — A contract for the leasing for a longer period than one year, or for the sale, of any real property, or an interest therein, is void, unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the lessor or grantor, or by his lawfully authorized agents."

To entitle a party to the specific performance of a contract, "a note or memorandum, sufficient to take a contract of sale out of the operation of the Statute of Frauds, must state the whole contract with reasonable certainty so that the substance thereof may be made to appear from the writing itself without recourse to parol evidence." *Mentz* v. *Newwitter*, 122 N. Y. 491.

The receipt given by the defendant seems to be sufficiently definite and certain to meet all the require-

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ments of the rule stated save in one particular. The price is specified, $5,500, the names of the parties given, the property described, and the date of closing the deal given. It will be noted, however, that the cash payment was to be $1,000, the $100 paid November 28, 1918, and the $900 to be paid April 1, 1920. The balance of the purchase price, $4,500, was to be made up by assuming an existing mortgage on the property, and by giving a further mortgage for the difference. It appeared from evidence given on the trial that the mortgage to be given would amount to a considerable sum. The memorandum or receipt signed by the defendant does not specify the terms of such mortgage, how long it was to run, or the rate of interest it should bear. As to the rate of interest probably the law would presume the parties contemplated the legal statutory rate. However, as to the time for which such mortgage should run and the terms of payment of interest the memorandum is silent. There was no evidence given on the trial as to anything said between the parties on that subject, although under the rule such parol proof would have been inadmissible.

Under the general rule governing cases of this kind we think the memorandum relied on is insufficient to entitle the plaintiff to specific performance. It is too indefinite and uncertain in the particulars pointed out to sustain this action. In the case of *Milliman* v. *Huntington*, 68 Hun, 258, the action was one for specific performance. The memorandum relied on in that case provided a part of the purchase price was to "*be secured by bond and mortgage of not less than three years duration.*" The court held the contract too indefinite to be specifically enforced. The court said the contract must "be certain and definite in all its material provisions," citing *Wright* v. *Weeks*, 25 N.

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Y. 153; *Buckmaster* v. *Thompson,* 36 id. 558 v. *Miller,* 58 id. 192; *Brown* v. *N. Y. C. R.* id. 79; *Drake* v. *Seaman,* 97 id. 230.

In the case of *Wright* v. *Weeks,* 25 N. Y memorandum signed by the owner provide sale of certain property "*upon the terms as s* These terms were shown by parol to have tain cash payments, and the assumption of ing mortgage, but the court held the agreem tive under the Statute of Frauds.

The court cannot make a contract for th We therefore find in this case the plainti entitled to recover. Under the circumstances, we think the complaint should be dismissed costs.

Ordered accordingly.

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KANK REALTY COMPANY, Plaintiff, *v.* BERNARD Defendant.

(County Court, Saratoga County, February, 192

**Adjoining land owners — falling branch of tree — when trespass will not lie.**

Where during a storm of unusual violence one of of a tree on defendant's land was so broken that it plaintiff's land, the mere fact that defendant's experienced man, went upon plaintiff's land and in s in a proper manner to remove the limb, which as a his weight and movements in the tree had fallen u tiff's house, doing damage, does not constitute an trespass, and defendant's motion for a dismissal of plaint will be granted.

ACTION in trespass.

John A. Slade, for plaintiff.

Harold H. Corbin, for defendant.

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MCKELVEY, J. The parties are the owners of adjoining premises at Saratoga Springs, upon each of which there is erected a dwelling house. A tree of medium size stood on the defendant's lands near the boundary. A wind storm of unusual violence broke one of the limbs of the tree so that it overhung the plaintiff's premises and menaced his dwelling. A short time thereafter the defendant employed an experienced man to remove the limb. When the man went into the tree with his ropes and other appliances the limb, already weakened, fell as the result of his weight and his movements. Striking the plaintiff's house it caused damages, the amount of which the jury have estimated by a special finding which is not questioned.

The plaintiff sues in trespass, there being neither proof nor allegation of negligence. Moreover, the defendant's agent, sworn by plaintiff, testified that what he did was necessary and proper, and was done in a proper manner.

The question is, then, whether the mere fact that an agent of defendant went upon plaintiff's lands, and in doing a proper act in a proper manner, caused damage, constitutes an actionable trespass. I call it a proper act because, with the limb thus menacing his neighbor's dwelling, it was his moral duty to remove the menace, regardless of whether, in strict legal theory, it was or was not his legal obligation. This question, thus presented upon a remarkably simple state of facts, has been somewhat disturbing both to court and counsel, and I was in such doubt upon the trial that I deemed it the better practice to reserve decision upon the defendant's motion for dismissal, pending the determination by the jury of the amount of damages, and also of the question whether the limb did in fact fall by reason of the act of defendant's

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agent. The findings of the jury that the fall of was due to an act of defendant's agent, and to the amount of damages, are unchallenge parties.

The determination of this question depends in my opinion, upon whether there was or w trespass, within the meaning of the rules wh been applied to that form of action from tin morial; and a careful examination of a numb cases cited on both sides leads me to the co that an actionable trespass, such as would c right to damages, must necessarily presup involve a wrongful or unjustifiable entry u lands of another; or the performance of s proper, careless, wrongful or unnecessary act

An act done in good faith, in a careful an manner, and in the performance of a legal duty, does not, in my opinion, constitute suc pass. In this holding I believe I am support more authoritative cases, and I feel that the of Judge Earl in *Losee* v. *Buchanan*, 51 N. Y. not only illustrates the distinction very cle covers the present case in apt and concis Speaking of the general rule of trespass th judge said: "The rule, as thus announced, l exceptions, even when one makes a perso upon the lands of another. I may enter my n close to succor his beast whose life is in d prevent his beasts from being stolen or to pr grain from being consumed or spoiled by to carry away my tree which has been blo upon his land, or to pick up my apples wh fallen from my tree upon his land, or to tak sonal property which another has wrongfu and placed there, or to escape from one who my life."



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This appeals to me as a fair statement of the rule, for all the purposes of the case at bar. It accords with the justice and equity of the present situation, and its application will prevent what would otherwise result in a palpable injustice.

So far as this proof goes, the tree was not dangerous before the storm — it became a menace to plaintiff's property by reason of an act of God, and without the intervention or fault of defendant. Finding it thus a menace to his neighbor's home, the defendant, with reasonable diligence and prudence, and through the medium of an experienced agent exercising due care, attempted to remove it in the usual way and in a careful manner. Its fall is not claimed to have been due to negligence or want of care.

If I am correct in my conception of an actionable trespass, and unless it can be held that every entry upon another's lands, for purpose right or wrong, and with method good or bad, must impose liability for damages for any and all accidental occurrences, I think that there can be no basis for recovery in the case at bar. Had the plaintiff alleged and proven negligence of any kind, or in any respect, then, confessedly, the rule would be otherwise; but this is plainly and definitely an action for trespass, and nothing more.

I therefore grant the defendant's motion for the dismissal of the complaint, upon which decision was reserved pending the answer of the jury to the special questions submitted.

Ordered accordingly.

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# Matter of the Transfer Tax upon the C. GOTTLOB KOLB, Deceased.

(Surrogate's Court, Bronx County, February,

**Transfer tax — what not subject to — statutes — davits — Tax Law, § 221(b) — Code Civ. Pro. §**

The statute imposing a transfer tax, being a law, will be construed strictly against the state ar to the taxpayer to the end that he may not be special burdens without clear warrant of law.

Where the appraiser in fixing a transfer tax savings bank account standing in decedent's name his daughter, but the proof embodied in an affid daughter is that the moneys in said account wer derived from gifts to her from various persons, a by her to decedent who deposited them in the tr and that the only withdrawal therefrom was made her request and the money delivered to and used account should not have been included in the apprai as subject to a transfer tax.

A contention that section 829 of the Code of Civil applies to the affidavit made by the daughter is unt while the fact that the affidavit is self serving m sidered in deciding what weight should be given to i is not warranted in disregarding it particularly as stand uncontradicted and unimpeached.

Only such transfers of investments as are tax article 10 of the Tax Law become liable to taxa section 221(b) of the Tax Law, which was in force of decedent's death, but before the tax thereunder the value of the transfer should be ascertained by from the value of the investments so much of the d chargeable against them.

In appraising the fair market value of the transf investments at the time of decedent's death, the accr thereon to that date must be included.

PROCEEDINGS on appeal from order fixing tax.

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Ehrich, Wheeler & Walter (William C. Stone, of counsel), for appellant.

John A. Boyle, Jr., for state comptroller.

SCHULZ, S. The executors of the last will and testament of the decedent appeal from the report of the transfer tax appraiser and the order entered thereon in this proceeding.

The first ground of error asserted is that in fixing the tax there was included an account in the Bowery Savings Bank in form as follows: "Christian G. Kolb, in trust for Marie E. D. Kolb, daughter." This account amounted with interest to the sum of $2,417.51. It is contended that the moneys evidenced thereby were the property of the said daughter before the death of the decedent and form no part of his estate and that the trust which the form of the account evidenced was irrevocable.

The daughter of the decedent named in the account submitted an affidavit in which she set forth that the moneys deposited therein were her own moneys derived from gifts made to her by various persons and entrusted by her to her father, the decedent, who deposited the same in the said account and that the only withdrawal was made by her father in the year 1917 at her request in the sum of $400, and was delivered to and used by her. So far as the record discloses, the appraiser did not require the deponent to appear and be examined nor was any other witness interrogated.

The form of the account standing alone establishes a tentative trust revocable at will, until the depositor died or completed the gift in his lifetime by some unequivocal act or declaration, such as the delivery of the pass book or notice to the beneficiary. *Matter of*

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*Totten,* 179 N. Y. 112; *Matthews* v. *Brooklyn Savings Bank,* 208 id. 508.

In this matter we have nothing but the presumption which the form of the account raises, on the one side, and on the other, the affidavit in question which, if it truthfully states the facts, rebuts the presumption, shows that the moneys deposited were in fact the property of the daughter and would lead to the conclusion that the account should not have been included for purposes of taxation. See cases cited in *Matter of Klein,* 92 Misc. Rep. 318.

I find no support in the authorities for the contention that section 829 of the Code applies to the affidavit in question. The same are to the contrary (*Matter of Gould,* 19 App. Div. 352; 156 N. Y. 423; *Matter of Brundage,* 31 App. Div. 348; *Matter of Bentley,* 31 Misc. Rep. 656), and while the affidavit is self-serving which fact must be considered in deciding what weight shall be given to it, and must be received with caution, that of itself does not warrant me in disregarding it. *Matter of McGillicuddy,* 194 App. Div. 28. In view of the fact that the affidavit was received, the deponent not subjected to an examination or cross-examination and that its recitals stand uncontradicted and unimpeached, I reach the conclusion that the account in question should not have been included for purposes of taxation. The law imposing the tax, being a special tax law, must be construed strictly against the government and favorably to the taxpayer, so that the latter may not be subjected to special burdens without clear warrant of law. *Matter of Vassar,* 127 N. Y. 1, 12. When there is any doubt as to whether a tax is to be levied or not, it should be resolved against the state. *Matter of Wiemann's Estate,* 179 N. Y. Supp. 190.

Another ground of appeal is that a tax was fixed upon some investments pursuant to the provisions of

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section 221-b of the Tax Law (Cons. Laws, chap. 60, as amd. by Laws of 1917, chap. 700, § 2), which section is claimed to have been in violation of the Constitution of the United States and that of the state of New York.

Since the argument of the matter, however, the United States Supreme Court has rendered its opinion in *Matter of Watson*, N. Y. L. J., Dec. 11, 1920, to the effect that the statute in question violated neither the state nor the federal Constitution. In the brief of the appellants it was conceded that a decision in that matter would dispose of the constitutional question raised by them on this appeal.

It is further claimed by the appellants that it was error to fix the amount of said tax under section 221-b of the Tax Law, *supra*, without deducting from the value of the investments subject to such tax a proportionate amount of the debts and other charges paid by the executors, and further that under the section in question, accrued interest should not have been included in determining the value of the investments.

Section 221-b, since repealed by chapter 644 of the Laws of 1920, was in force upon the date of the decedent's death and provided so far as material to the question involved, that: "Upon every transfer of an investment, as defined in article fifteen of this chapter, taxable under this article, a tax is hereby imposed, in addition to the tax imposed by section two hundred and twenty-one-a, of five per centum of the appraised inventory value of such investment, * * *."

The report of the appraiser fixes the gross value of the estate of the decedent at $323,940.44; the deductions at $43,672.44 and the net estate at $280,268. In the gross estate are contained investments taxable under the section stated which the appraiser has valued at the sum of $161,029.47, so that it is evident

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that the securities bear the same proportion of the deduction which the value of such securities bear to the value of the gross estate which is forty-nine and seven-tenths per cent thereof or in value $21,705.20. It is claimed that the appraiser was in error in failing to deduct said amount from the value of said securities before imposing the tax of five per cent under section 221-b.

The question to be considered has been the subject of an opinion by the comptroller of the state of New York, reported in 14 State Department Reports, 535, in which he states that the language of the section providing that if the investments are liable to this additional tax it must be five per cent of the " appraised inventory value " precludes any consideration as to how much a legatee or distributee may actually receive, and that this additional tax becomes the state's property upon the death of the owner without any reference whatsoever to such amount.

From the language of the section itself, it is apparent that the tax under section 221-b is not a tax upon the property itself, but is only a tax upon the transfer thereof just as that under the other sections of the article have been held to be. *Matter of Watson,* 226 N. Y. 384; affd., U. S. Sup. Ct., N. Y. L. J. Dec. 11, 1920; *Matter of Hazard,* 228 N. Y. 26; *Matter of Vanderbilt,* 187 App. Div. 716; *Matter of Penfold,* 216 N. Y. 163; *Keeney* v. *State of New York,* 222 U. S. 525. As only such transfers of investments as are taxable under article 10 become liable for the tax which section 221-b imposes upon them (*Matter of Washbourne,* 180 N. Y. Supp. 507; affd., 190 App. Div. 940; affd., 229 N. Y. 518; *Matter of Zimmerman,* 110 Misc. Rep. 295), and as debts are deducted from the estate before the value of the transfer is fixed for purposes of taxation under article 10, it would seem to me that

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before the tax under section 221-b is imposed, the value of the transfer should be ascertained by similarly deducting from the value of the investments so much of the debts as are chargeable against them. The sections of article 10 should be read together. *Matter of Austin,* 109 Misc. Rep. 584 and cases cited. If we construe the phrase "appraised inventory value" to mean the market value of the investments at the time of the death of the decedent regardless of the liabilities which exist against them instead of as meaning the inventory value of the investment as appraised for purposes of taxation, that is after the deduction of a proportionate amount of the debts, it would appear that the tax would not be a tax upon the transfer but rather a tax upon the property itself, whereas in *Matter of Watson,* 226 N. Y. 384, 401, the court said: "It is a flat tax of five per cent upon the transfer of property not theretofore taxed as specified."

Startling results might follow if such a construction were favored. Assuming an estate to consist of $100,000 in investments as defined by article 15 of the Tax Law, and $1,000 of other property, and to be subject to debts of $100,000, the transfer in such estate, assuming that it goes to a person of the five per cent class, would be taxable under article 10, hence it would be taxable under section 221-b. The tax under section 221-a would be on $101,000, less debts of $100,000, that is on $1,000, whereas the additional tax under section 221-b would be five per cent of $100,000, although it would be necessary to apply approximately $99,010 of the investments to the payment of the debts. Only about $990 of the investments would remain and be transferred, upon which a tax of $5,000 would be imposed.

The use in the statute of the phrase "appraised inventory value" was unfortunate, and while the

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question is not free from difficulty, I do not believe the intent of the legislature was to the effect claimed by the counsel for the comptroller. I find support for this view in the decisions of the surrogates of the counties of New York and of Kings. Thus in *Matter of Kemp* and in *Matter of Peck,* both reported in the New York Law Journal of March 3, 1920, the learned surrogate of Kings county reversed orders fixing transfer taxes and remitted the matters to the appraiser to deduct proportionate amounts of the debts and administration expenses from the value of the securities taxable under section 221-b of the Tax Law. In *Matter of Kent* and in *Matter of Turner,* N. Y. L. J. June 17, 1920, it was held by one of the learned surrogates of New York county that the appraiser erred in not including the funeral and administration expenses and commissions in making an allowance for the proper deduction from the market value of the securities in fixing the sum on which the tax should be imposed under section 221-b.

In *Matter of Watson,* 226 N. Y. 384, the court said: "Again, it must be noted, that if the amount of an estate is eaten up by debts so that the assets consisting of these investments do not pass to anybody, of course, there can be no tax. *Likewise the investments should pay their proportionate part of the debts without tax*" (italics are mine), and while it may be urged that the statement quoted was dictum, it is the only expression by the Court of Appeals that I have been able to find upon the question.

I hold that a proportionate amount of the deductions should have been charged against the investments mentioned before fixing the value of their transfer for purposes of taxation under section 221-b.

The contention that the interest to the date of the death of the decedent should not be included in

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appraising the value of such investments is not sustained. It is the fair market value of the transfer at the decedent's death which must be ascertained (Tax Law, § 230), and this includes accrued interest. *Matter of Peck, supra.*

The fourth ground of appeal is from the taxation of the securities hereinbefore referred to under section 221-b aforesaid, it being claimed that such section was suspended, nullified and repealed by the provisions of chapter 627 of the Laws of 1919. This ground, however, was not urged in the brief, and in my opinion is not tenable.

The order appealed from is reversed for the reasons stated and the report remitted to the appraiser to proceed as above indicated.

Order reversed.

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## Matter of the Estate of JOHN FOX, Deceased.

(Surrogate's Court, New York County, February, 1921.)

**Wills — construction of — what does not work a forfeiture of a legacy — gift over — accounting.**

A testamentary provision that in case any beneficiary shall directly or indirectly contest or litigate the validity, factum or effect of the will in any action or proceeding with a view to void or annul the will, the legacy of such contestant shall be revoked and any devise or bequest in favor of such contesting person shall be absolutely void, and the will take effect and be administered as though such contesting person predeceased the testator, does not work a forfeiture of the legacy to a contestant, unless there is a gift over in case of breach of the condition, and a gift of the residue is not such a gift over.

PROCEEDING upon an accounting by a trustee.

Edwin C. Mulligan, for The Equitable Trust Company, as trustee, and Katharine O'Brien, as executrix.

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Ellwood M. Rabenold, special guardian for arine Hogan O'Brien and John Fox O'Brien.

Eleanor B. Fox, beneficiary under the v person.

COHALAN, S. In this accounting proceedi court is asked to pass upon the validity or ef the "in terrorem" clause contained in par 22 of the will as against Eleanor B. Fox by of her action in the Supreme Court to have t will and testament of the deceased set asi adjudged invalid. Paragraph 22 of the will p in substance that in case any beneficiary na the will shall directly or indirectly contest or the validity, factum or effect of the will in any or proceeding with a view to void or annul tl the legacy of such contestant shall be revok any devise or bequest in favor of such con person shall be absolutely void and the will take effect and be administered as though su testing person died before me." The cases hc a forfeiture of a legacy is not effected by such vision in a will unless there is a gift over in the breach of the condition, and a gift of the is not such a gift over. *Matter of Wall*, 76 Mis 106; *Matter of Arrowsmith*, 162 App. Div. 623. graph 22 contains no gift over in particular tei provides that the will shall be construed as contesting person — in this case, Eleanor B. had predeceased the testator. We must therefc at the provisions of the will which would be e in case Eleanor B. Fox were not living at the the death of the testator. Paragraph 17 of provides that in case of the death of Eleanor without issue her share of the estate is bequea Katharine O'Brien. The legacy is in expres

the gift of the residue of the estate. This general residuary clause under the authorities above cited does not appear to be sufficient to make the forfeiture effective. Furthermore, the one primarily interested in sustaining the forfeiture is Katharine O'Brien, as under the terms of paragraph 17 of the will she would be entitled to Eleanor B. Fox's share. The O'Brien infants, children of Katharine O'Brien, represented by the special guardian in this proceeding, are only contingently interested in the share of Eleanor B. Fox in the event of the latter's death without issue, which they would take provided their mother, Katharine O'Brien, should predecease them. Katharine O'Brien makes no claim of forfeiture against Eleanor B. Fox. In view of all the foregoing it is the opinion of the court that no forfeiture has resulted.

The proceeds of the sale of the furniture, furnishings and appurtenances of the residence "Foxhurst" should be distributed equally between Katharine O'Brien and Eleanor B. Fox.

A decree may be submitted on notice settling the account accordingly.

Decreed accordingly.

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## Matter of the Estate of JOHN A. MITCHELL, Deceased.

(Surrogate's Court, New York County, February, 1921.)

**Wills — construction of — specific legacies — corporations — partnership agreements.**

An agreement between partners, contemplating the incorporation of their business as a publishing company, stated that it was the desire of both to retain within their own control, so far as possible, the entire management of the corporation about to be formed, with power to purchase each other's stock. *Held*, that this option only existed during the lifetime of the parties. One of the partners who at his death, twenty-five years later, was the owner of three-fourths of the capital

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stock of the company, bequeathed one hundred ar shares thereof to his sister, cousin and three of his in the business, in different allotments, with proviso tl of said legatees should not survive him the share w legatee would have received should go to his or her children in equal shares, or in default of such issue the testator, then such shares should go to the next each of the original legatees in equal shares, *per st* not *per capita*. The remaining shares owned by test bequeathed in trust for his wife for life, and at l to several of his business associates, including the t viously remembered. *Held*, that all the legacies wer and the legatees were severally entitled to a *pro rata* tion of a dividend on the stock, declared within a ye death of the testator.

During a four months' illness of a servant who ha testator's employ for the fourteen months preceeding he paid her medical and hospital expenses and thougl not discharged she received no salary. The hospital were in excess of her wages during her absence, a resuming work she continued in the service of the test his death, seven months later. *Held*, that under a cla will reading: "I give and bequeath * * * to ea other servants who are in my employ * * * at of my death and have been so employed by me for than one year preceding my death, the sum of five dollars," said servant was entitled to the legacy.

PROCEEDING upon the judicial settlement accounts of executors.

Spencer, Ordway & Wierum (Nelson S. S of counsel), for executors Charles Holt and H. Ordway.

Root, Clark, Buckner & Howland (Grenvill and Cloyd Laporte, of counsel), for objecting l

Murray, Ingersoll, Hoge & Humphrey (T F. Humphrey, of counsel), for executor Georg Ingersoll.

Francis J. Hogan, for Mary Broderick.

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FOLEY, S. On the accounting two questions arise. John A. Mitchell executed his will May 27, 1918, and died about a month later. He bequeathed 750 shares of stock in the Life Publishing Company, of which 180 were given outright to his sister, his cousin and three associates in his business. The remaining 570 shares he gave in trust to his widow for life, and on her death to several of his associates, including the three previously remembered. The weekly magazine *Life* was founded by himself and Andrew Miller in 1882. Mr. Mitchell's interest was three-fourths, and Mr. Miller's one-fourth of the firm. In 1892 the partnership was incorporated, with a capital of $10,000. Mr. Mitchell received 750 shares and Mr. Miller the remaining 250 shares in the company, which each retained up to Mr. Mitchell's death. The former was president, and the latter secretary and treasurer of the company. The business grew from an original capital of $600 to a valuation, in 1920, of $1,000,000.

The first question in dispute is whether the legacies of 180 shares are general, as claimed by the executors, or specific, as contended by the legatees. The decision of this question also involves the payment of a dividend, declared within one year of the death of testator, amounting to $100 per share, or a total of $18,000. If the legacies are specific this amount goes to the legatees; if general, it goes into the residuary estate left to the widow. I hold that the legacies are specific. *Matter of Security Trust Co.*, 221 N. Y. 213, sustains this finding. The 2d paragraph of the will, which relates to this stock, is as follows: "*Second.* I give and bequeath to my sister, Anna M. Richards, one hundred shares of the capital stock of Life Publishing Company; to my cousin, Amelia H. Ames, fifty shares * * *; to Edward S. Martin ten shares * * *; to James S. Metcalfe ten shares

* * *; to Thomas L. Masson ten shares * * *. If any of said legatees shall not survive me, then I give and bequeath the shares of stock which any such legatee would have received under this paragraph if he or she had survived me to his or her children who shall survive me, in equal shares, or if any of such legatees should leave no children surviving me, then I give and bequeath the same to his or her next of kin in equal shares, *per stirpes* but not *per capita.*" The 3d paragraph bequeathed the remaining 570 shares.

In *Matter of Security Trust Co., supra,* 219, Mr. Justice Crane says: "It is the intention of a testator, as gathered from his entire will, which determines whether the legacy be general or specific." A very slight indication of an intention to give shares owned by him when the will is executed is enough to make the legacy specific. *Thayer* v. *Paulding,* 200 Mass. 98.

The indications of intent in this will are just as strong as those in *Matter of Security Trust Company.* The stock of the Life Publishing Company was not publicly dealt in. The corporation here was even a closer one, with but two stockholders. The agreement of 1892 between Messrs. Mitchell and Miller stated: "The parties desire * * * to retain as far as possible the entire management of said corporation so to be formed *within their own* control." Under this agreement also each had the power to purchase the other's stock, in the event of a desire to withdraw or to sell the stock to an outsider. A fair construction of this contract is that this option only existed during the lifetime of the parties. After the death of either, the executor of the deceased did not possess the option to purchase from the survivor. In the present case Mr. Mitchell bequeathed and owned at

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his death 750 shares out of a total issue of 1,000, whereas in the *Security Trust Company* case the decedent held and bequeathed 2,024 out of 5,000 shares in the company. Mr. Mitchell must have known that his executors would not be able to replace the stock bequeathed by him in case he disposed of it, in whole or in part, during his lifetime. His will disposes of the exact number of shares owned by him at the time it was executed. At his death he possessed the same amount of stock. The legatees here were favored relatives and business associates who apparently had helped to make the business successful. His intention was plainly to give them an immediate interest. Moreover, he provided for a complete disposition of the stock, to the children or next of kin of the legatees, in case any one predeceased him. Finally it is claimed by the executors that there is a distinction between the gift of the 180 shares and the gift of the remainders in the 570 shares, because of the use of the word " my " in paragraph 3 referring to the latter, which authorizes the trustees " to retain all of *my* said 570 shares." This contention cannot be sustained. The executors concede that the legacies of the 570 shares are specific. *Tifft* v. *Porter*, 8 N. Y. 516. There is no actual difference between these two groups. The words of gift in each case are the same. In the case of the 570 shares which were left in trust he necessarily conferred powers upon, and gave instructions to, his trustees. Certain of the legatees receive shares under both clauses. The use of the word " my," therefore, does not limit one group but characterizes all of the legacies as specific. 2 Jarman Wills (6th ed.), 1028, 1077; *Kunkel* v. *MacGill*, 56 Md. 120. For these reasons the legatees are entitled to the specific shares and to a *pro rata* distribution of the dividend of $18,000, but without interest.

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The second question has to do with the claim of Mary H. Broderick, one of his servants, under the 5th paragraph of the will, which reads: "I give and bequeath * * * to each of my other servants who are in my employ * * * at the time of my death and have been so employed by me for *not less than one year preceding my death,* the sum of five hundred dollars." The executors dispute her claim. It appears that Mary H. Broderick was employed by the testator for fourteen months, from May 1, 1917, to his death on June 29, 1918. During this period she became ill and was obliged to go to the hospital. Mr. Mitchell paid her medical and hospital expenses amounting to $262. It is true that her salary was not paid during the four months of her illness, but she was not discharged and she was excusably absent. The hospital expenses were in excess of her wages during her absence. As soon as she was able she resumed her work and continued until his death seven months later. It is neither in harmony with the spirit of his will, nor his generous treatment of her, that she should be deprived of this small legacy. I hold that she is entitled to it.

Decreed accordingly.

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## Matter of the Probate of the Last Will and Testament of WILLIAM S. ROWLEY, Deceased.

(Surrogate's Court, Westchester County, February, 1921.)

**Surrogates' Courts — service by publication — probate — when motion to vacate service of citation by publication denied — wills.**

The presumption in favor of the regularity of judicial process should not be lightly disregarded, and the statement in the moving affidavit on a motion to vacate the service of the

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citation to attend the probate of a will, that "I did not receive the citation or summons by mail" cannot be accepted as a reason for opening up the decree admitting the will to probate.

MOTION to vacate and set aside a decree admitting a will to probate.

Horace Comfort (Frederick P. Close, of counsel), for motion.

Mott & McCready, in opposition.

SLATER, S. Upon notice of motion, Samuel Rowley Macdonald and John Rowley seek to vacate and set aside the decree entered herein on the 7th day of October, 1920, admitting to probate the will of William S. Rowley, and for leave to file objections to the probate of said will. The petition was served upon them and others by publication and mailing. The petition for the order of publication recited that Samuel Rowley Macdonald resides at Wallingford, Conn., and John Rowley resides at Palo Alto, Cal. Pursuant to the order of publication, citation was duly published and mailed to them at said addresses, as appears by the affidavits of publication and mailing. The citation issued July 13, 1920, and was returnable September 28, 1920. They both swear in their affidavits, and Samuel Rowley also appearing personally, and stated, that they never received the citation by mail and were not otherwise informed as to the probate of the will until late in October, 1920.

When service of process is made by mail, the deposit in the post office is the service. *Elliot* v. *Kennedy*, 26 How. Pr. 422. The provision of the statute for service by publication is a substitute for personal service, and it must be strictly observed. *Fink* v. *Wallach*, 47 Misc. Rep. 242; *Fair* v. *Kenny*, 103 id. 412. The serv-

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ice of the citation in every way complied with the Code. It is presumed that, when papers are mailed, they are received by the person who is addressed, and that the person is fairly and fully apprised. *Mishkind* v. *Sidorsky,* 189 N. Y. 402; *Heller* v. *Levinson,* 166 App. Div. 673. The burden of proving want of jurisdiction is upon the party questioning it, and it must be established in a clear and satisfactory manner to nullify the decree. *Steinhardt* v. *Baker,* 20 Misc. Rep. 470; affd., 163 N. Y. 410. Upon motion to vacate a service of citation, the moving party must distinctly negative the existence of circumstances which would render the service valid.

By subdivision 6 of section 2490 of the Code of Civil Procedure the surrogate is authorized: "To open, vacate, modify, or set aside, or to enter as of a former time, a decree or order of his court; or to grant a new trial or a new hearing for fraud, newly discovered evidence, clerical error, or other sufficient cause * * * only * * * in the same manner, as a court of record of general jurisdiction exercises the same powers." The complaining parties do not allege fraud, newly discovered evidence or clerical error. Do they come under "other sufficient cause?" *Matter of Townsend,* 215 N. Y. 442; *Matter of Tilden,* 98 id. 434; *Matter of Henderson,* 157 id. 423; *Ferguson* v. *Crawford,* 70 id. 253. The excuse offered is that they did not receive the citation through the mails. It was admitted by Samuel Rowley Macdonald that he was at Wallingford, Conn., throughout the summer of 1920 and was well known to the postal authorities. John Rowley stated in his affidavit that he had not lived at Palo Alto, Cal., but at Berkeley, Cal., for over twelve years last past. However, deeds executed by him in 1910, recorded in the Westchester county register's office, recite him as a resident of Palo Alto, Cal. The

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attorney for the proponent, upon inquiry, was informed by members of the family on the day of the funeral of the decedent that John Rowley's post office address last known to them was Palo Alto. At this hearing no one was produced who knew otherwise.

The circumstances under which the power may be exercised are questions addressed to the court to which application is made. *Matter of Severance,* 106 Misc. Rep. 710, and cases cited; *Matter of Tilden,* 98 N. Y. 434; *Matter of Henderson,* 157 id. 423; *Matter of Townsend,* 215 id. 442; *Matter of Hermann,* 178 App. Div. 182.

In *Matter of Norwood,* 111 Misc. Rep. 530, the petitioner had knowledge of the correct address of the persons served; but mailed the citation to another place and, consequently, the decree of probate was opened. In *Pfotenhauer* v. *Brooker,* 52 Misc. Rep. 649, statement was made that not only was no summons ever served, but at the time when, and place where, the service was alleged to have been made, the defendant was not present and had not been at that place.

It appears from the evidence that both Samuel Rowley Macdonald and John Rowley had engaged the same attorney early in July, 1920. On the day of the issuance of the citation, July 13, 1920, the attorney for the proponent wrote Mr. Comfort and said: "Referring to your favor of the 13th instant in the matter of the estate of William S. Rowley, we filed the original will and probate papers on the 13th instant and obtained order for publication of citation returnable on September 28th at 10 A. M. at White Plains."

From letters in evidence it seems that throughout the summer the two moving parties were considering a contest of the probate of the will. The whole matter was gone over with counsel. John Rowley wrote to

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his attorney on August 20, 1920: "The matter of a contest I leave entirely in your hands."

I can imagine a case where the citation, though properly served by publication and mailing, never was received by the party sought to be served because he was absent in a distant country and could not and did not receive notice until after the decree of probate. Such facts do not exist in the instant case. The presumption in favor of the regularity of judicial process should not be lightly disregarded. I have been unable to find a case anywhere where the excuse "I did not receive the citation or summons by mail" was offered and accepted as a reason for opening up a decree or judgment. A practice which would permit decrees to be opened from time to time on such an excuse would lead to intolerable consequences and dangers to judicial determinations. Opportunity would be offered, and in fact invited, for fraud to be practiced. The conclusiveness of surrogates' decrees, section 2550 of the Code, would be shallow indeed. In the instant case the attorney failed to suggest to his clients what he knew, namely, that the citation had issued and was returnable September 28, 1920. His oversight, or neglect, and his clients' statements that they failed to receive the citation are not sufficient causes, in my opinion, to open the decree of probate. No valid grounds of objections within my jurisdiction are presented, and the decree admitting the will to probate should not be set aside.

Under section 2763 of the Code of Civil Procedure, the Appellate Division is called upon on appeal to review this determination as if an original application were made to that court. *Matter of Shonts*, 229 N. Y. 374, 378.

Counsel opposed to the motion called for certain correspondence passing between Mr. Comfort and the

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moving parties hereto. They refused to produce the correspondence, but stipulated upon the record that the court should read the letters and insert in the record such part thereof as reflected upon the question involved. This I have done.

Motion denied.

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CHEMUNG IRON AND STEEL COMPANY, Appellant, *v.* HERMAN S. HORN and Another, Respondents.

(Supreme Court, Appellate Term, First Department, December, 1920, Term — Filed February, 1921.)

**Contracts — delay in delivery of goods — rescission — evidence.**

The rule that while delay in the performance within a reasonable time of a contract calling for successive deliveries of goods may give rise to a cause of action for damages it will not always permit rescission, does not apply to an executory contract of sale where delivery within a reasonable time is a concurrent condition to any obligation of the buyer to accept and pay and where the time to perform such condition has expired before notice of rescission was given.

More than four months after the making, on September 13, 1918, of a contract for the sale and delivery of certain iron, and at a time when plaintiff was not ready to deliver the goods, defendants in writing cancelled the order, and while the testimony on behalf of plaintiff in an action for damages tended to show that the average time in which it was possible to secure delivery of goods called for by the contract, during the war, was from four to five months, one of the defendants testified that plaintiff stated that it could deliver the goods within four or five weeks. *Held*, that a finding that on January 16, 1919, when the order was cancelled because of plaintiff's delay, more than the reasonable time contemplated for the delivery of the goods had elapsed, was warranted.

The trial court having found upon proper evidence that plaintiff did not deliver the goods within a reasonable time, as

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required by the contract of sale, the plaintiff had no right of action for damages, and a judgment dismissing the complaint upon the merits will be affirmed.

APPEAL by plaintiff from a judgment of the Municipal Court of the city of New York, borough of Manhattan, second district, in favor of defendants dismissing the complaint upon the merits.

Morrell, Bates, Topping & Anderson (Laurence A. Anderson, of counsel), for appellant.

Cohen, Haas & Schimmel (Isadore Cohen, of counsel), for respondents.

LEHMAN, J. The contract herein was made on September 13, 1918. When the defendants wrote to the plaintiff that they cancelled the order, more than four months had passed, and concededly even at that time the plaintiff was not ready to deliver the goods. While the plaintiff produced testimony to show that the average time in which it was possible to secure delivery of goods of this kind during the war was from four to nine months because, as one witness stated, deliveries were made "at the mill's convenience," there can be no doubt but that in view of the defendant's testimony that the plaintiff stated it could deliver within four or five weeks, the trial justice was entirely warranted in finding that on January sixteenth, when the defendants notified the plaintiff that they cancelled the order because of plaintiff's delay, far more than the reasonable time as contemplated by the parties for the delivery of the goods had elapsed.

In the case of *Pope* v. *Terre Haute Car & Mfg. Co.*, 107 N. Y. 61, the court stated: "There is no allegation in the complaint as to the time within which the contract was to be performed by delivery of the iron,

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and no time is mentioned in the written contract. The law supplies the omitted term, and the contract in legal effect was an engagement on the part of the plaintiffs to deliver within a reasonable time. The promise of the plaintiffs to sell and deliver the iron, and of the defendant to receive and pay therefor were mutual and concurrent and neither party can maintain an action against the other for a breach of the contract without proving performance on his part. It was, therefore, necessary, as a matter of proof, that the plaintiff should show that he delivered, or offered to deliver, the iron within a reasonable time, for this was his contract, and whatever is essential to a cause of action must be averred." That rule of law was well established and well recognized even before the time of that decision, and I cannot find that it has ever been overruled or even questioned by any decision since then, but was expressly reaffirmed in the case of *Eppens, Smith & Weimann Co.* v. *Littlejohn*, 164 N. Y. 187. In the present case the trial justice has found upon proper evidence that the plaintiff did not deliver or offer to deliver the goods it sold within a reasonable time as required by its contract, and it would, therefore, seem that the plaintiff has no right of action against the defendants.

It is claimed, however, that under the decision of *Taylor* v. *Goelet*, 208 N. Y. 253, even though the plaintiff had failed to perform its contract within a reasonable time, the defendants had no right to give notice of cancellation without prior notice to the plaintiff requiring performance within a reasonable time specified in the notice. In that case the court decided that no rescission can be made of an executory contract where the time of performance has been left indefinite until time has been made an essential element of the contract by a reasonable notice demanding perform-

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ance and stating that the contract will be rescinded if the notice is not complied with. It is to be noted, however, that the court was there considering the rights of the parties under a building contract involving successive or continued acts, and which necessarily remained in existence until rescinded by one party, and which if rescinded after performance was begun, would necessarily result in a forfeiture, by the party partially performing, of the value of his work. It would not, however, seem to have any application to an executory contract of sale of goods not to be specially manufactured by the seller and where the seller was required merely to perform the one act of delivering the goods to the buyer. In such a case as shown above, the seller must tender delivery within a reasonable time, and if he fails to do so, the buyer is under no obligation to accept the goods. No rescission of the contract by the buyer is, therefore, necessary, but the buyer's obligation has ceased when the seller failed to perform the concurrent condition to be performed on his part. A notice on the part of the buyer that the contract is cancelled is, under such circumstances, not a wrongful act on his part nor a repudiation of his obligation, and, therefore, cannot give rise to any cause of action on the part of the seller. It should be regarded rather as an intimation on the part of the buyer that in his opinion the reasonable time for delivery had passed, and that therefore the seller need not go to the trouble and expense of making a tender which will not be accepted. In sending such notification the buyer assumes the risk of the court or jury deciding that a reasonable time had not in fact yet elapsed, but he assumes no other risk or liability. While the case of *Taylor* v. *Goelet, supra,* has not been expressly limited, it is significant that in the subsequent case of *Brede* v. *Rosedale Terrace Co.*, 216

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N. Y. 246, it is cited as an example of the rule that: "Where a contract involving successive or continued acts is to be performed in a reasonable time, delay, though it will give rise to a cause of action for damages, will not always permit rescission." It has been applied to executory contracts of sale where the goods were to be specially manufactured, and to executed contracts of sale where the price was paid and title passed before delivery, but it evidently has no application to an executory contract of sale where delivery within a reasonable time was a concurrent condition to any obligation of the buyer to accept and pay, and where the time to perform such concurrent condition had expired before the notice was sent.

Judgment should therefore be affirmed, with twenty-five dollars costs.

GUY and WAGNER, JJ., concur.

Judgment affirmed, with twenty-five dollars costs.

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HENRY E. NORTHMANN, Landlord, Respondent, *v.* ABRAHAM HASS, Tenant, Appellant.

(Supreme Court, Appellate Term, First Department, December, 1920, Term — Filed February, 1921.)

**Lease — exercise of option to renew — notice — landlord and tenant — summary proceedings — evidence.**

By a lease expiring April 30, 1920, the tenant had the option of a renewal for three years upon giving notice to the landlord by registered mail between April 1 and November 1, 1919. During that time the tenant gave both oral and written notice to the general agent of the landlord having charge of the premises and collection of rents, that he exercised his option to renew. *Held*, that where the testimony of the tenant in a summary proceeding against him as a holdover brought by one

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who became the owner of the premises during the continuance of the lease, was to the effect that when he gave the oral and written notice he was told by the agent that notice by registered mail was not necessary, was denied by the agent, a question of fact was presented and a final order in favor of the landlord entered by direction of the court after a jury trial will be reversed and a new trial ordered.

APPEAL by tenant from a final order entered in favor of the landlord in the office of the clerk of the Municipal Court of the city of New York, borough of The Bronx, first district, upon direction of a verdict by the court after trial before a jury.

Bernard S. Deutsch, for appellant.

Robert E. Bergman (Louis Steckler, of counsel), for respondent.

WAGNER, J. Holdover proceedings were brought to recover possession of premises occupied by the tenant under a written lease expiring April 30, 1920. The premises were owned by one Ebling and during the continuance of the leasehold were sold to the plaintiff herein, the actual conveyance taking place on April 10, 1920. The lease contained a provision that the tenant could exercise an option of renewal for three years upon giving notice to the landlord by registered mail addressed to the landlord at his residence between April 1 and November 1, 1919. The tenant, as appears by his testimony, did during that time give both oral and written notice to one Sudbrink, plaintiff's agent, that he had exercised his option to renew according to the provisions of the lease and upon inquiry as to whether it was necessary to send further notice by registered mail was informed that they were aware of his intention to renew and that formal notice by registered mail was not necessary. At the



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conclusion of the trial, the learned justice directed a verdict in plaintiff's favor and we think erroneously.

It was admitted upon the trial that Sudbrink was Ebling's agent, and the testimony discloses that such agency was not a limited one but general so far as these premises were concerned. He had entire charge of them, collected the rents, superintended them during all the time covered by defendant's lease. All the checks were made to his order for payment of rent. Although clearly the notice of an election to renew must be given in strict accordance with the requirements provided for in the lease, and the tenant here had failed in their strict observance, nevertheless the general agent under the circumstances and the power vested in him by the owner had the right to orally waive, or rather on behalf of his principal elect not to treat the tenant's failure to give the required notice as an indication that he did not desire a renewal. *United States Realty & Imp. Co.* v. *Ewing*, 172 N. Y. Supp. 214. Although evidence given by tenant to the effect that he was told by Sudbrink that notice by registered mail would not be required and that he could have the renewal as he requested, was denied by the agent, we think it presented a question of fact for the determination of the jury and the trial court was without warrant in directing a verdict.

Final order reversed and new trial granted, with thirty dollars costs to appellant to abide the event.

GUY and LEHMAN, JJ., concur.

Final order reversed and new trial granted, with thirty dollars costs to appellant to abide event.

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ALBERT HARRIS, Respondent, v. WILLIAM EINHORN, Appellant.

(Supreme Court, Appellate Term, First Department, January Term — Filed February, 1921.)

**Sales — action for goods sold and delivered — retention of partial delivery — counterclaim — damages.**

While a vendee who accepts, retains and uses a partial delivery of goods due in a single delivery may be held for the purchase price thereof he is also entitled to relief against the vendor for damages because of delay or default in the delivery of the balance of the goods.

An oral contract for the sale of luminette called for the delivery of three pieces at once, and twenty-one pieces to be shipped during the months of October and November, 1919, upon plaintiff's receipt of same. Prior to the date when payment for the three pieces fell due, the plaintiff had received a number of pieces from his consignor but none had been delivered to defendant though he made frequent requests therefor. Plaintiff's demand for payment for the three pieces was refused because of his failure to deliver the remaining pieces called for by the contract. In an action for goods sold and delivered the defendant counterclaimed for the increased value of the goods not delivered because in the meantime their market price had risen. *Held*, that whether defendant suffered any damages by reason of plaintiff's failure to deliver according to the contract, was a question which should have been submitted to the jury, and a judgment entered upon a verdict directed in plaintiff's favor, after the dismissal of the counterclaim, will be reversed and a new trial ordered.

APPEAL by the defendant from a judgment of the City Court of the city of New York, in favor of the plaintiff, after dismissal of defendant's counterclaim upon the direction of a verdict by the court.

L. O. Rothschild, for appellant.

Marks & Marks (Henry Pearlman, of counsel), for respondent.

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WAGNER, J. Admitting the plaintiff's cause of action for goods sold and delivered, the defendant counterclaimed for breach of contract on the part of the plaintiff in failing to deliver the balance of the merchandise. It appeared by stipulation made at the inception of the trial that plaintiff and defendant entered into an oral agreement on October 6, 1919, whereby plaintiff agreed to sell, and defendant agreed to purchase three pieces of luminette, to be delivered at once, and twenty-one pieces to be shipped during the months of October and November, upon plaintiff's receipt of the same. Immediate delivery was made of the three mentioned pieces, payment for which became due seventy days after delivery, namely, December 16, 1919. Prior to the last mentioned date, though plaintiff had received a number of pieces from his consignor, none had been delivered to the defendant, though the latter made frequent requests, plaintiff making the false explanation that he had received none.

Upon the trial plaintiff gave as a reason for his failure to deliver that he feared defendant's credit and desired to take no further risk.

On December 16, 1919, when the payment for the delivery of the three pieces in suit fell due, payment was demanded, met by defendant's refusal to pay because of plaintiff's failure to keep his engagement to deliver the remaining pieces provided for by the contract. In the meantime the market, defendant claimed, for this commodity had risen in price, the increased value thereof forming the foundation for the counterclaim interposed.

It appears from an examination of the colloquy ensuing between court and counsel at the termination of the trial, that the theory upon which the learned court below dismissed the counterclaim and directed a

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judgment in plaintiff's favor, was that although the plaintiff had broken his contract by failing to make deliveries as agreed before any breach by the defendant had taken place, the defendant had not, prior to December sixteenth, elected to treat the failure as a breach, and that his default on that date was fatal to any claim of breach on plaintiff's part by way of counterclaim. Analyzing the logic of this view it reduces itself to the following proposition: The plaintiff's failure to deliver goods as per contract was not a breach, because the defendant did not elect to treat it as a breach, but defendant's failure to pay for goods already delivered was such a breach as to deprive defendant of his cause of action which had arisen, though plaintiff had not elected to treat it as a breach.

It is undisputed that at the time the defendant defaulted in payment, the plaintiff had already committed six respective breaches of his contract to deliver the goods as received by him. Repeated requests for the delivery of the promised goods were made, with the response of inability of compliance. It is difficult to perceive how an election to treat the nondelivery as a breach, prior to its discovery by defendant, as the learned court held, was incumbent upon defendant, was possible under the circumstances. Consequently no reservation of rights was made, and defendant was relieved of any duty to rescind or take affirmative action with respect to such breaches until knowledge of plaintiff's deliberate act of deception in misleading the defendant had been brought to his attention.

When the date of payment for the prior lot had arrived and discovery of plaintiff's deception as to his contractual engagement had been made, payment was declined and demand made for damages suffered by reason of failure to deliver the remaining pieces.

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Therefore, both of the parties stood in identical positions. Both had breached their contract. Neither took any step to rescind it by reason of the other's breach. Under the circumstances the defendant clearly was entitled to counterclaim his damages, if he suffered any, because of such breach against the purchase price of the goods which he had received, and the dismissal of the counterclaim and a direction for plaintiff was, therefore, error.

It has been well settled that a vendee who accepts, retains and uses a partial delivery of goods due in a single delivery, may be held for the purchase price thereof, and on the other hand may have relief against the vendor for damages because of delay or default in the delivery of the balance of the goods. *Deeves & Sons* v. *Manhattan Life Insurance Co.*, 195 N. Y. 324; *Avery* v. *Willson*, 81 id. 341; *Brady* v. *Cassidy*, 145 id. 171.

Tracing the logic of the rule to the situation here presented, we find it equally applicable, and so it has been recently held in *Goodyear Tire & Rubber Co.* v. *Vulcanized Products Co.*, 228 N. Y. 118, 125. There the goods in question were sold on terms of thirty days; the vendor delayed in delivery, and finally ceased to deliver. The last delivery was made on June twenty-fifth, which would have made payment due on July twenty-fifth. The defendant did not refuse to make payment or take a stand of any kind regarding plaintiff's breach until some time in October. The court, nevertheless, held that the defendant was entitled to recover on its counterclaim for plaintiff's failure to deliver as per contract, saying: "As has already been stated, the respondent finally refused to pay the purchase price due for goods actually delivered unless its claim for damages was recognized and assurances given of future deliveries. It did not attempt to cancel the

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contract because of past defaults on the part of the vendor and we do not think that the record sustains this refusal to pay the purchase price or any part thereof * * *. Upon this refusal to pay, the vendor rescinded the contract and refused to make further deliveries and the question is whether these acts of the respective parties have in any way affected respondent's right to damages because of failure to make deliveries due before the rescission. We do not think that they have. Assuming that the vendor's prior and existing default did not prevent it from treating respondent's refusal to pay as a breach warranting rescission, we do not see that this relieved it from the liability which had already accrued for failure to make deliveries long past due. The very rule which entitles appellant to claim the purchase price for partial deliveries made by its assignor, entitles respondent to assert the right which accrued at the same time to offset damages for failure to deliver the balance of the goods and we do not think that this right was lost by its subsequent conduct."

This case is direct authority for appellant's position here. In both the vendor failed to deliver as agreed. In both the purchaser failed to make payments for deliveries when due. In fact the validity of the contention is emphasized by comparison in the respective laxity and promptness of the claims made in the two cases. See, also, *McDowell* v. *Starobin El. Supply Co.*, 190 App. Div. 676.

The rule enunciated in *Hadfield* v. *Colter*, 188 App. Div. 563, relied upon by the respondent, relates to an anticipatory breach of a contract which was kept alive by subsequent acceptances of later deliveries, and insistent refusals to consent to a proposition of cancellation. That clearly distinguishes it from the present case. Upon the evidence as adduced a ques-

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tion of fact was presented as to whether defendant suffered any damages because of plaintiff's failure to deliver according to the contract, which question of fact should have been submitted to the jury.

It follows, therefore, that the judgment must be reversed and a new trial ordered, with thirty dollars costs to the appellant to abide the event.

GUY and LEHMAN, JJ., concur.

Judgment reversed and new trial ordered, with thirty dollars costs to appellant to abide event.

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THOMAS P. CARROLL et al., Respondents, *v.* DAVID HARRIS, etc., Appellant.

(Supreme Court, Appellate Term, First Department, January Term — Filed February, 1921.)

**Ships and shipping — discharge of cargo — lease of off-shore berth — lighters — evidence — contracts — custom and usage.**

The hiring of an off-shore berth on a North river pier means that the ship discharges its cargo off the side into lighters or scows.

One side of a North river pier leased by defendant for an off-shore berth was occupied by one of its steamships for five days and the stipulated *per diem* rate paid. The lighters remained in the berth five days longer. In an action to recover an additional charge at the same *per diem* rate a witness for plaintiff on his direct examination was asked: "What is the custom with regard to an off-shore berth, are lighters considered part of the ship for the transaction?" to which the witness answered "in this special case, yes." *Held,* that defendant was entitled to show whether it had control over the lighters after its steamship had left the pier, or whether it had any connection with the owner of the cargo, and that the exclusion of such testimony was error for which a judgment in favor of plaintiff will be reversed and a new trial ordered.

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Parties who contract on a subject matter conce known usages prevail, incorporate such usages by into their agreement, if nothing is said to the con

APPEAL by defendant from judgment of tl ipal Court of the city of New York, borough hattan, fifth district, in favor of the plaintiff

Robert S. Mullen, for appellant.

Clarke & Clarke (Richard H. Clarke, of cou respondents.

GUY, J. Plaintiffs, lessees of pier 2, Nor alleged in their complaint that defendant h and during the period from February 21 to 1920, leased and hired from the plaintiffs for and wharfing purposes the south side of the the rental of $100 a day, and the defendant occupied the pier for docking and wharfage for the period mentioned for which he agree plaintiffs $100 a day; that defendant paid account of the rental, leaving a balance of $ and owing plaintiffs.

Plaintiff put in evidence an agreement in dated February 21, 1920, between "Cor Transportation Co. [the name under which de carried on business] at 41 Liberty Street, Ne City, s/s Lake Beacon hereinafter known as t pant and the Carroll, Hagon & Carroll of Ne lessees and mortgagees of pier #2 North Riv inafter known as the landlord. It is agreed lows:— to lease the south side of pier #2, Nor for an off shore berth without dock space, v to commence today at 7 A. M. at the rate of day."

The hiring of an off-shore berth meant that discharged its cargo off the side into lighters

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The steamship *Beacon* occupied the berth about five days, for which a bill for $500 was sent to defendant, and that amount was paid by defendant. The lighters remained in the berth or slip five days longer, however, for which a bill for an additional $500 was rendered by plaintiffs to defendant, which defendant refused to pay; and it was to recover for this additional charge that the action was brought and for which the court awarded a judgment in plaintiffs' favor.

Despite the fact that plaintiff's claim as pleaded was that the defendant used and occupied the pier for docking and wharfage purposes not only for the time that the steamship *Beacon* was in the slip but also for the five additional days during which the lighters remained in the slip after the departure of the *Beacon*, the trial judge refused to allow the defendant to show whether the defendant had any control over the lighters remaining at the pier after the steamship left, or whether the defendant had any connection with the owner of the cargo. The evidence thus offered by defendant was relevant to the issue whether the defendant, or the *Beacon*, had occupied the berth as pleaded, and its exclusion was erroneous.

On the back of the written agreement are certain printed conditions made a part of the contract, and one of these conditions reads: "Berth is not vacated until vessel is out of slip, all merchandise removed from and pier cleaned." This clause is susceptible of the construction, which was evidently given it by the trial judge, that although none of the cargo was put on the pier, if the lighters remained in the slip after the departure of the steamship, the occupation of the lighters might be regarded as a continuance of the occupation by the steamship. And plaintiffs' counsel on the direct examination of their witness

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Donohue asked that witness "What is the custom with regard to an off-shore berth, are lighters considered part of the ship for the transaction?" to which the witness answered "in this special case, yes;" notwithstanding which defendant was not permitted to show the custom with reference to lighters occupying docking space. Having thus brought out the custom, as claimed, the respondents evidently conceded that the contract was ambiguous. Under the circumstances the appellant should have been permitted to show what he claimed to be the custom, and it was error to exclude that evidence. Parties who contract on a subject matter concerning which known usages prevail incorporate such usages by implication into their agreement if nothing is said to the contrary. *Hostetter* v. *Park,* 137 U. S. 30. In commercial transactions incidents may be annexed to the written agreement by usage or custom. Williston Cont. § 652.

McCOOK, J., concurs in result.

Judgment reversed and a new trial ordered, with thirty dollars costs to appellant to abide the event.

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HERMAN H. KAHRS, Landlord, Appellant, *v.* CHARLES L. EYGABROAD, Tenant, Respondent.

(Supreme Court, Appellate Term, First Department, January Term — Filed February, 1921.)

**Summary proceedings — statutes — landlord and tenant — trial — pleading — evidence — when final order reversed and new trial granted.**

A summary proceeding under the statute (Laws of 1920, chap. 942) was instituted upon a landlord's petition alleging that he was in good faith seeking to recover possession of an

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apartment occupied by the defendant tenant in petitioner's ten-family apartment house, for the immediate and personal use of himself and family, as a dwelling. The answer was a general denial, and the landlord on his direct examination was asked: "Do you intend to occupy for yourself as a dwelling place for yourself and family, for usual purposes, the apartment now occupied by" the defendant tenant. An objection by the tenant's counsel that the answer called for a conclusion was sustained and exception taken. The court correctly charged that the good faith of the landlord in the matter was a question for the jury. *Held,* that the exclusion of the testimony sought to be elicited by the question was error for which a final order in favor of the tenant entered upon the verdict will be reversed and a new trial granted.

APPEAL by the plaintiff, landlord, from a final order of the Municipal Court of the city of New York, borough of The Bronx, second district, in favor of the tenant, entered upon the verdict of a jury.

Martin Gollubier, for appellant.

Arnstein & Levine (Sidney S. Levine, of counsel), for respondent.

WAGNER, J. The landlord instituted the summary proceeding under chapter 942 of the recently enacted rent laws, alleging that as owner of the premises in question, a ten-family apartment house, he was seeking in good faith to recover possession of the apartment occupied therein by the defendant tenant for the immediate and personal use of himself and family as a dwelling. The tenant answered said petition by the interposition of a general denial. After a somewhat extended trial before the court and jury, the latter returned a verdict in the tenant's favor resulting in a dismissal of the petition upon the merits and the denial of the motion made to set the verdict aside.

The test by which applications of this character

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under chapter 942 of the Laws of 1920 are to be governed is evident from an examination of the phraseology the legislature saw fit to employ. Good faith on the part of the landlord is the cornerstone upon which the whole provision rests. Actual and *bona fide* intent to make such use of the premises as he alleges in his petition following the language of the statute is the condition precedent upon which the right to the relief afforded by it depends. Otherwise its salutary effect could at will be nullified and the underlying purpose which prompted its passage entirely thwarted. Not only must his petition allege but the proof must show the good faith animating him in seeking to obtain the use of the property for personal purposes.

In the present case, the landlord was asked upon his examination: "Do you intend to occupy for yourself as a dwelling place for yourself and family, for usual purposes, the apartment now occupied by Mrs. Eygabroad?" Upon the ground that the answer called for a conclusion of the witness, the tenant's counsel's objection was sustained to which timely exception was taken. It is urged upon us on this appeal, and we are convinced by the authorities that the exclusion of this testimony constituted error requiring a reversal of the judgment.

It is true that intent is usually to be judged by the light of surrounding facts and circumstances, for the reason that they afford a satisfactory test which is known and capable of consideration by the triers of fact. But as was aptly stated in *Cortland County* v. *Herkimer County,* 44 N. Y. 26: "here the witness speaks of an intent which may be at variance with the surrounding facts and circumstances, and of which none can know but himself." It has repeatedly been held since the decision in *Seymour* v. *Wilson,* 14 N. Y. 567, that the motive with which an

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act was done may be inquired into by asking of the party perpetrating the act, and that the real activating motive may be stated as a fact and considered in connection with the other evidence. *Pope* v. *Hart,* 36 Barb. 636; *Dillon* v. *Anderson,* 43 N. Y. 236; *Pritchard* v. *Hirt,* 39 Hun, 380. We think the following quotation from the opinion of the court in *More* v. *Deyoe,* 22 Hun, 208, 223, is a succinct declaration of the rule: "But where the act is equivocal in character, and the intent is directly in issue, it may be ascertained by direct questions, as was sought to be done in this case. Not that the answer would be absolutely conclusive but it would be an item of admissible evidence."

Since the jury were rightly instructed that the good faith of the landlord as to the use of the premises for himself and family was a question of fact for them to determine, it would seem clear that his intention in that regard constituted a material and important factor for their consideration. We express no view in that respect of an answer by the plaintiff to the question propounded. Both principle and authority, however, compel us to hold that an answer to such question should have been allowed by the learned trial justice, and for this error of exclusion we direct a new trial.

Final order and judgment reversed and new trial granted, with thirty dollars costs to appellant to abide the event.

GUY and MCCOOK, JJ., concur.

Final order and judgment reversed and new trial granted, with thirty dollars costs to appellant to abide event.

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LAWRENCE S. HARRIS, Respondent, v. ECLIPSE LIGHT COMPANY, Appellant.

(Supreme Court, Appellate Term, First Department, January Term — Filed February, 1921.)

**Trial — jury — false answer of juror as to qualifications — affidavits — motion to set aside verdict granted.**

To permit one to sit as a juror who gave a false answer to a material question, is a fraud upon the court and the parties, and an order denying a motion to set aside the verdict on the ground of misconduct of said juror will be reversed and the motion granted.

Upon motion to set aside a verdict in favor of plaintiff, for misconduct of a juror in giving a false answer to the question whether he knew the defendant or any of its officers, put to him before he was accepted as a juror, the principal moving affidavits tended to establish that after the verdict said juror in the presence of several persons admitted that he did know the defendant and was prejudiced against it, and that he had gratified this prejudice by influencing his fellow jurors in plaintiff's favor. All this, together with other matters stated in the moving affidavits, was denied by the juror in his answering affidavit. *Held*, that an order denying a motion to set aside the verdict will be reversed and a motion granted in the interests of justice.

APPEAL by defendant from an order of the City Court of the city of New York, denying its motion to set aside verdict in favor of plaintiff on the ground of misconduct of a juror. The motion was heard by the same judge who tried the case. The judgment upon the verdict has been previously affirmed by this court.

Horace London (Charles L. Hoffman, of counsel), for appellant.

George F. Mattuck (David C. Myers and Joseph H. Kutner, of counsel), for respondent.

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McCOOK, J. Upon the trial of the action, which was to recover for salesman's commissions alleged to be due plaintiff from defendant, the jurors were asked separately, among other questions, whether they knew the defendant company or its officers, naming them. The negative answers received influenced counsel for defendant in his selections. Among the jurors so chosen was one Leon, a salesman, whose alleged misconduct is the subject of the motion to set aside this judgment.

By his answering papers, respondent establishes the fact that in the deliberations of the jury Leon had no greater influence with his associates than any other juror; that he showed no prejudice; and, indeed, that very little discussion was required because the jurors all felt that the defendant's witnesses were untruthful and made for that reason a quick decision in favor of plaintiff.

Respondent contends that this alone disposes of the appeal. His argument is that if Leon did not influence the verdict the result could not have been affected by any misconduct on his part and should not be disturbed. This does not follow. An unprejudiced juror might well have disagreed with his associates; he might even have persuaded them all to his way of thinking. It therefore becomes necessary to consider the grounds assigned for granting this motion.

The gist of the charge is that after the verdict Leon made in the presence of several persons admissions to the effect that he did know the defendant in the action and was prejudiced against it, and that he had gratified this prejudice at the expense of defendant upon the trial in question. If these charges are true, they mean that he falsely denied in answer to questions by defendant's counsel his acquaintance with the defendant concern and its officers, that he was disqualified

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to sit on the jury and that truthful answers would have disclosed the disqualifying facts, and he would have been excused.

Appellant's principal affidavits tend to establish Leon's admissions; they are by three persons, one of whom is related to an officer of defendant, another was formerly an employee of defendant, and the third, so far as appears, is disinterested. Other affidavits tend to establish that Leon formerly called at the office of the defendant, asked to see and saw one of its officers, applied for a position with defendant, giving false references, and attempted at other times (unsuccessfully) to sell it goods. These particular affidavits are all by interested witnesses.

The only answering affidavit, other than those of the jurors, is by Leon himself. He makes denial that before the trial he knew the defendant or any of its officers, that he ever went to their office, attempted to enter their employ or sell them goods, and he denies further that after the trial he told anybody he had known them or was prejudiced against them or had gratified this prejudice by influencing his associates on the jury in favor of the plaintiff. He concedes that about the time alleged he was at the office of the New Home Gas and Electric Supply Company, Inc., where the other admissions are charged to have been made, having sold it a bill of goods, that he was then asked if he was selling any goods to the defendant and thereupon stated he had been a juror in a case where defendant was being sued.

This makes the issue clear; either Leon did admit his prejudice and was guilty of the misconduct alleged, or else an innocent statement by him in the presence of a relative of defendant and two other persons, one of them disinterested, was seized upon, elaborated and made the occasion of a conspiracy. For the latter



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alternative, it would be necessary further to believe that two employees of the defendant and one of its officers, none of them present at the trial, joined in a conspiracy to establish certain other facts not true.

Without deciding where the truth lies, we are of opinon that this is a case where the interests of justice require a new trial.

Recent authorities emphasize the requirement that triers of fact should be beyond suspicion. *Ament* v. *Schubert Piano Co.*, 172 App. Div. 423; *Robinson* v. *Ball*, 187 id. 799. It is desirable in the formation of a jury that every legal right shall be preserved to a party, to the end that the verdict when recorded shall be understood to be the result of an unbiased judgment of the appeal. Every suitor is entitled to a fair trial before unprejudiced jurors, and if a juror is permitted to sit on account of a false answer given by him to a material question, it is fraud upon the court and the parties, and the verdict may well be set aside. *Slater* v. *United Traction Co.*, 172 App. Div. 404. See, also, *McGarry* v. *City of Buffalo*, 53 N. Y. St. Repr. 882; *Fealy* v. *Bull*, 11 App. Div. 468; *Matter of Nuns*, 176 N. Y. Supp. 858.

Order appealed from reversed, with ten dollars costs and disbursements, defendant's motion to set aside verdict granted, judgment vacated and a new trial ordered.

GUY and WAGNER, JJ., concur.

Order reversed, with ten dollars costs and disbursements.

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EMMA WEINMAN, Landlord, Respondent, *v.* OWEN TRAINOR and Another, Tenants, Appellants.

(Supreme Court, Appellate Term, First Department, January Term — Filed February, 1921.)

**Summary proceedings — when will not lie against tenant as a holdover — landlord and tenant — lease.**

The agreement of a tenant that in case of a sale of the premises he will vacate them on thirty days' notice, is a condition and not a conditional limitation of the lease.

While the refusal of a tenant to vacate the premises on the day set by such a notice entitles the landlord to bring an action in ejectment or for breach of covenant, the tenant is not a holdover until his lease expires, and summary proceedings will not lie against him as a holdover.

APPEAL by tenants from a judgment of the Municipal Court of the city of New York, borough of Manhattan, seventh district.

House, Grossman & Vorhaus (Henry E. Cohen, of counsel), for appellants.

Philip J. Sinnott, for respondent.

*Per Curiam.* The tenant is in possession of the premises in question under a written lease which contains the following provision: "Should the said premises be sold the tenant agrees to vacate same to any time on 30 days notice." The premises were sold and a notice was given "that in accordance with the terms of the lease must ask you to vacate house 619 West 142 Street within 30 days from June 1."

The tenant failed to vacate on the day set and this summary proceeding was brought to dispossess the tenant as a holdover. The court below decided that

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the tenancy had expired and awarded the possession of the premises to the landlord.

This conclusion we think was error. The provision of the lease under which the landlord claims possession is a condition of the lease and not a conditional limitation. The term of the lease did not expire by the giving of the thirty days' notice. By refusing to vacate the tenant has breached a covenant which gives the landlord the right to re-enter or a suit for damages. The tenant is not a holdover until his lease has expired. Therefore summary proceedings did not lie. Re-entry can only be accomplished by an action in ejectment.

Judgment appealed from reversed, with thirty dollars costs and petition dismissed.

Present: GUY, WAGNER and MCCOOK, JJ.

Judgment reversed, with thirty dollars costs.

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MAX LOEW, Plaintiff, *v.* OSTREICHER BROS., a Corporation, Defendant.

(Supreme Court, Bronx Special Term, February, 1921.)

**Pleading — when motion for order requiring plaintiff to serve an amended complaint granted — allegations contained in complaint — damages — actions.**

A plaintiff taking the ground that his complaint states but a single cause of action should plead the facts in such manner as to enable the defendant to hold him to that position throughout the litigation.

Where as against the contention of the defendant that the facts alleged in the complaint may readily be made the basis of an action either for an assault, false imprisonment or malicious prosecution, the plaintiff maintains that the allegations of the complaint constitute but a single cause of action grow-

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ing out of a series of occurrences having relation continuous transaction with special circumstances or aggravation as to each step in the progress of defendant's motion for an order requiring plaintiff t amended complaint separately stating and numberin constituting the various causes of action which claims to be embraced in the complaint, will be gran within the time fixed by the order to be entered plai lates in writing that he intends and desires to st cause of action for false arrest and imprisonmer should specify which allegations are pleaded in which in aggravation of damages.

MOTION by the defendant to require the pla serve an amended complaint wherein he sh arately state and number the facts constitu various causes of action now embraced in t plaint herein.

Louis W. Osterweis, for motion.

William C. Scofield, Jr., opposed.

GIEGERICH, J. The defendant moves for a requiring the plaintiff to serve an amended c wherein he shall separately state and number constituting the various causes of action claim embraced in the complaint. The complaint stance alleges that while the plaintiff was lav and upon the premises occupied by the defend merchant tailor in the borough of Manhatt York city, the agents and servants of the de with the knowledge and consent of said defen in the course of its business, without the cause or provocation, threw or attempted to t plaintiff from said store and then did seize the plaintiff back into the store and about t ises; that at such times and during the ac related, the agents and servants of the defen

in the course of such assaulting and employment, pulled the plaintiff back into the store and surrounded him and imprisoned and detained him in the said store and premises and caused his arrest by a police officer; that the plaintiff was forced by the defendant, its agents and servants, to accompany such police officer to a public station house, where he was charged with the crime of malicious mischief, and in which he was imprisoned until he was arraigned before a police magistrate, and that upon being arraigned before the magistrate the plaintiff was again maliciously and without probable cause falsely charged with the crime of malicious mischief, but after a hearing the charge was dismissed and the plaintiff was discharged from custody. The complaint further alleges that the malicious acts complained of were contrary to the laws and customs of this state and in violation of the same and against the will of the plaintiff, whereby he was not only greatly hurt, humiliated and greatly distressed in mind and body, but injured in credit, hindered in business and suffered a nervous breakdown, by reason whereof and whereby the plaintiff alleges he sustained damages in the sum of $25,000. The complaint is divided into paragraphs, but no words or figures are used to indicate whether one or more causes of action were intended to be alleged. The defendant insists that the facts set forth in the complaint may readily be made the basis of an action either for an assault, false imprisonment or malicious prosecution. The plaintiff, on the other hand, maintains that the several statements contained in the complaint constitute but a single cause of action growing out of a series of occurrences and have relation to but one continuous transaction alleged, with special circumstances of injury or aggravation as to each step in the progress of the affair. In *Sheldon* v. *Lake*, 9 Abb. Pr. N. S. 306,

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the complaint alleged that the defendant assaulted the plaintiff, dragged him violently through the public streets, imprisoned him in the custody of the sheriff and restrained him of his liberty without probable or reasonable cause, whereby he was wounded, injured in credit and hindered in business. The defendant moved to strike out parts of the complaint as irrelevant and redundant, or if more than one cause of action was intended to be set up, that the complaint be made more definite and certain and causes of action be separately stated and distinctly numbered, and it was held that the complaint stated but one cause of action, but that the allegation that the acts complained of were in violation of law, not being a traversible allegation, was irrelevant and redundant and should be stricken out. In that case, however, it was conceded by the plaintiff's attorney on the motion that the action was for false imprisonment and that alone. In *Tyson* v. *Bauland Co.*, 68 App. Div. 310, cited by the defendant, the complaint combined in a single count two causes of action, one for false imprisonment and another for malicious prosecution. The defendant failed to demur to the complaint, but at the commencement of the trial made a motion to require the plaintiff to elect which cause of action she intended to pursue. The court in the course of its opinion at pages 312 and 313 said: "The complaint contains but a single count, which might be either for false imprisonment or malicious prosecution. It was treated on the trial as a complaint for both causes of action. * * * The two causes of action, however, could not be combined in a single count (Code Civ. Pro. § 483), although they may be united in the same complaint. *Marks* v. *Townsend*, 97 N. Y. 590, and cases cited. By not demurring the appellant must be deemed to have waived the defect, and was probably not entitled to the election at

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the commencement of the trial as a strict matter of right. As it must be assumed from the record that both causes of action were submitted to the jury and the verdict may have been founded on either, the judgment appealed from cannot be sustained unless the proof established both causes of action." In *Daly* v. *Wolaneck*, 29 Misc. Rep. 162, I held that where the nature of the action is conceded, allegations of assault and also of false imprisonment may be joined in the statement of one cause of action, but where the complaint does not disclose the theory of the action the plaintiff may be compelled to make his complaint more definite and certain by separately stating the causes of action and by numbering them, unless the plaintiff stipulates that he intends and desires to state but a single cause of action specifying which allegations are set forth in chief and which in aggravation. The plaintiff's brief in the case at bar states that the action was and is one for false arrest and imprisonment. The defendant advances the argument that such concession is not made in a manner which could work an estoppel and that a formal order of the character indicated in *Daly* v. *Wolaneck, supra,* should be entered so that the plaintiff may not upon the trial change his position and attempt to have submitted to the jury an issue other than one of false arrest and imprisonment. In *Fay* v. *Marx,* 2 Bradbury Pl. & Pr. 81, the complaint contained allegations showing causes of action for both negligence and nuisance, but in so uncertain a manner as to leave it in doubt whether the plaintiff sought to recover on one or both grounds. The defendant moved to compel the plaintiff to separately state and number his causes of action, and on the hearing of such motion counsel for the plaintiff stated that only one cause of action was intended, and that for nuisance, and it was held that the plaintiff should be

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required to amend his complaint accordingly, as such statement of the plaintiff's counsel on the motion could not constitute an election. Although the plaintiff takes the ground that but a single cause of action is stated, he should, nevertheless, do it in such a manner as to enable the defendant to hold him to that position throughout the litigation. *Blake* v. *Barnes,* 9 N. Y. Supp. 933; 30 N. Y. St. Repr. 299. The motion should therefore be granted unless within a time to be fixed in the order to be entered hereon the plaintiff stipulate in writing that he intends and desires to state but a single cause of action, to wit, that of false arrest and imprisonment, and he should specify which allegations are set forth in chief and which in aggravation. Motion disposed of as above indicated, with ten dollars costs to the defendant to abide the event of the action.

Ordered accordingly.

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GEORGE H. FLETCHER and Another, Plaintiffs, *v.* THE MANHATTAN LIFE INSURANCE COMPANY, Defendant.

(Supreme Court, New York Special Term, February, 1921.)

**Pleading — foreclosure — answer — Statute of Frauds — accounting — when motion for judgment on the pleadings denied.**

Prior to the sale on foreclosure of a mortgage in which plaintiffs and defendant were participating owners, it was orally agreed that plaintiffs would refrain from bidding at the sale and that defendant should become the purchaser of the premises at a price not in excess of the amount due on the mortgage, together with taxes and expenses. Defendant, who bought in the premises at the sale, refused to carry out the agreement and held the property as its own for a number of years, collecting the income, and without notice to plaintiffs, conveyed the property and appropriated the proceeds of sale

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to its own use. In an action alleging the facts and demanding judgment declaring defendant a trustee for plaintiffs and requiring defendant to account for the proceeds of the sale in excess of the amount adjudged to be due it under the judgment of foreclosure and sale, the answer, besides a general denial, pleaded the Statute of Frauds as a defense. *Held*, that the facts pleaded, if proven, would make out a *prima facie* case, and defendant's motion for judgment on the pleadings will be denied.

MOTION for judgment on the pleadings.

Fletcher, McCutchin & Brown, for plaintiff.

Henry W. Kennedy (D. Theodore Kelly, of counsel), for defendant.

DELEHANTY, J. Defendant moves for judgment on the pleadings. The complaint states that the parties hereto were participating owners in a mortgage for $240,000 on certain premises in the city of New York of the value of not less than $250,000; that in an action for the foreclosure of said mortgage it was adjudged that the defendant was entitled to $193,499.77 as its interest in said mortgage and that the plaintiffs were entitled to the sum of $39,019.59; that prior to the foreclosure sale it was agreed between the defendant and the plaintiffs that the plaintiffs would abstain from bidding at said foreclosure sale and that the defendant would purchase the premises at a price not in excess of the amount due it, together with taxes and expenses, and would thereafter convey the premises to the plaintiffs or their nominees upon certain terms and conditions; that the sale took place and the defendant bought in said premises, the plaintiff being present but abstaining from bidding, and that thereafter the defendant refused to carry out its said agreement; that the defendant treated said premises as its

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own, held the same for a number of years, collected the income therefrom, and that subsequently without notice to the plaintiffs sold the same and appropriated the proceeds of the sale to its own use. Judgment is demanded declaring the defendant to be a trustee for the plaintiffs as to the premises in question and requiring the defendant to account for the income of the sale in excess of the amount due it under the judgment of foreclosure and sale. The answer contains a general denial and an affirmative defense to the effect that the agreement alleged in the complaint is void under the Statute of Frauds because not in writing. The sole question for determination is whether the Statute of Frauds constitutes a defense. It is well established that an oral agreement to convey an estate or interest in real property other than a lease for a term not exceeding one year is nugatory and unenforcible. *Wooley* v. *Stewart,* 222 N. Y. 347, 350. However, where a party has an existing interest in a mortgage upon real property and enters into an oral agreement with others for the protection of his rights in connection therewith, courts of equity will recognize such agreement as binding in order to prevent the perpetration of a fraud. *Ryan* v. *Dox,* 34 N. Y. 307; *Canda* v. *Totten,* 157 id. 281; *Congregation Kehal Adath* v. *Universal Building & Construction Co.,* 134 App. Div. 368. In *Wheeler* v. *Reynolds,* 66 N. Y. 227, 236, 237, the court says: "It is a mistake to suppose that parol agreements relating to lands are any more valid in equity than at law. They are always and everywhere invalid. But courts of equity have general jurisdiction to relieve against frauds, and where a parol agreement relating to lands has been so far partly performed that it would be a fraud upon the party doing the acts, unless the agreement should be performed by the other party, the court will relieve

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against the fraud and apply the remedy by enforcing the agreement. It is not the parol agreement which lies at the foundation of the jurisdiction in such a case, but the fraud. * * * But in cases of fraud courts of equity will sometimes imply a trust and will treat the perpetrator of the fraud as a trustee *ex maleficio,* for the purpose of administering a remedy against the fraud." In a somewhat similar situation Justice Houghton, writing for the Appellate Division in this department, said in *Congregation Kehal Adath* v. *Universal Building & Construction Co.*, 134 App. Div. 368, 370: "I understand the rule to be that where the owner of property about to be sold at judicial sale enters into an agreement with his mortgagee for a valuable consideration and a promise not to bid or procure bidders, that the mortgagee shall bid off the property and hold it for him, the mortgagee, in an action in equity to compel performance, cannot take advantage of the Statute of Frauds and escape because his contract was not in writing. Such is the distinct holding in *Ryan* v. *Dox* (34 N. Y. 307). While that decision has been subject to some attack it has never been overthrown and was recognized in *Canda* v. *Totten* (157 N. Y. 281) and in *Mackall* v. *Olcott* (93 App. Div. 282) as still good law. It is based upon the proposition that the party obtaining title obtained it through fraud and that equity will not permit the Statute of Frauds to be made a shield for fraudulent acts." I think the facts alleged in the complaint if proven make out a *prima facie* case, and, therefore, the motion for judgment on the pleadings made by the defendant must be denied.

Motion denied, with ten dollars costs.

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R. HENRY GREAVES, Plaintiff, v. AMERICAN INSTITUTE FOR SCIENTIFIC RESEARCH, Defendant.

(Supreme Court, New York Trial Term, February, 1921.)

**Corporations — membership — lack of power of officer to contract for life employment.**

While an agreement made by an agent of a corporation is not to be condemned, yet in the absence of an express authorization of or a ratification of the agent's acts, the agreement cannot be upheld.

Certain funds of a membership corporation were awarded to its secretary and treasurer for disbursement under the direction of the trustees, to pay for psychical research work and salaries of employees in connection therewith. *Held,* that the secretary and treasurer had no power to make a contract of employment with plaintiff as office manager for the term of his life.

Such a contract is unenforcible and where, not only from the oral testimony but from letters written by plaintiff to the secretary and others, the conclusion is irresistible that no such agreement was made, a compromise verdict in favor of plaintiff will be set aside as against evidence and the weight of evidence, and the complaint dismissed.

MOTION to set aside verdict.

I. Balch Louis, for plaintiff.

Dawson, Merrill & Dawson (Edwin S. Merrill, of counsel), for defendant.

ERLANGER, J. The memorandum published in this matter on February seventeenth is hereby recalled and the following substituted in place thereof:

Claiming that he was employed as office manager by the defendant, a membership corporation, for the term of his life, and that he was unlawfully discharged,

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plaintiff brought this action to recover his damages for such breach. It is alleged that the hiring occurred in December, 1909, and was terminated by notice at the end of the year 1916. His salary was at first $15 each week; was increased to $75 per month, and later to $100 each month, which latter sum he received at the time of his discharge. Plaintiff's employment was in connection with defendant's department known as the Psychical Research Society. During the period mentioned, James A. Hyslop was defendant's secretary and treasurer and it is claimed that he made the contract declared upon. Within this same period the defendant's other officers were a president and vice-president, besides a board of trustees, of which Hyslop was one. The trustees, from time to time, awarded to Hyslop funds, characterized as a "subsidy," out of which the psychical research work, as well as the salaries of the employees connected with it, were paid. This "subsidy" was disbursed by Hyslop under the direction of the trustees. The making of the contract was denied by the answer, and among other defenses it was urged that the defendant was without power either to make or ratify it; that such an agreement was unreasonable and would deprive future boards of directors of the power vested in them by statute to manage defendant's affairs, and was therefore null and void. The illegality of the contract was urged throughout the trial, but the case on the facts was sent to the jury, who returned a verdict for the plaintiff for $650. It was clearly a compromise verdict, but the new trial moved for was upon all the grounds mentioned in section 999 of the Code. Motions to dismiss were made at the end of plaintiff's case and again at the close of the entire case, and in each instance decision was reserved. Whether or not officers or agents of a corporation may make a life

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contract with one of its employees, binding on it, has been before our courts a number of times. Authorities exist on both sides of the question. In *Schwarz* v. *Regensburg & Son*, 168 App. Div. 903; affd., 223 N. Y. 521, it was held that an agreement with a former employee that if he would retire and refrain from competing with the defendant for the rest of his life or from engaging in its line of business, the defendant would pay him a fixed sum yearly for life, in weekly installments, was enforcible. In *Beers* v. *New York Life Ins. Co.*, 66 Hun, 75, and *Carney* v. *New York Life Ins. Co.*, 162 N. Y. 453, it was decided that agents, however plenary their power, could not make such a contract unless specifically authorized so to do. In another line of cases it was asserted that the corporation may be estopped from denying the agent's authority to make such an agreement. *Usher* v. *New York C. & H. R. R. R. Co.*, 76 App. Div. 422; affd., 179 N. Y. 544; *Montwil* v. *Am. Locomotive Co.*, 159 N. Y. Supp. 21. From this contrariety of views it is evident that each case depends upon its peculiar circumstances, and that such agreements, while not condemned, will not be upheld in the absence of an express authorization of or a ratification of the agent's acts. Applying the authorities to the case in hand it seems quite clear that the right of Hyslop to bind the defendant simply because he employed all the help in connection with his work, and because of his absolute charge of the "subsidy" from which all his aids were paid, invested him with no power to make the agreement. The fact that the plaintiff abandoned his work as a Unitarian pastor to ally himself with Hyslop does not aid him. Nor again does Hyslop's deception in the alleged promise made to plaintiff help the latter in the dilemma he is now in. The question is purely one of power. There was no

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proof from which such power can even be inferred, nor was it made to appear that the trustees were ever informed or had the slightest knowledge that plaintiff ever claimed that a life contract was made with him. Contracts of such a character, except in rare instances, have been held to be unreasonable, because they hampered the course of future trustees of corporations in the conduct and management of their affairs. When the evidence is considered, not alone the oral proof but the letters written by the plaintiff to Hyslop and others, the conclusion is irresistible that no such agreement was made. True the jury found the facts in favor of the plaintiff and awarded to him the most trifling damage. That sympathy played an important part in the finding is undoubted. That it was a compromise verdict is also self-evident. The verdict was clearly against the evidence and the weight of the evidence, and must be set aside. On the law of the case, the contract having been held by me to be unenforcible, no new trial should be granted, but the complaint should be and is dismissed. Exception to plaintiff. Thirty days stay; sixty days to make a case.

Ordered accordingly.

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JOHN E. MADDEN, Plaintiff, *v.* JOHN H. ROSSETER, Defendant.

(Supreme Court, New York Special Term, February, 1921.)

**Injunctions — when plaintiff will be granted a mandatory injunction — contracts — animals — receivers.**

Where by a written agreement of sale defendant was to have the possession and use of a valuable stallion, in California, during the seasons of 1919 and 1920, the plaintiff to have him

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for use in Kentucky during the seasons of 1921 and 1922, and "thereafter on new arrangements mutually satisfactory," the defendant has no legal right to insist upon any condition for the return of the horse to plaintiff except to ship him to plaintiff's stock farm in Kentucky, the season of 1921 now opening.

Where defendant flatly refuses to abide by the agreement unless plaintiff enters into a new agreement which is unsatisfactory to him, the plaintiff will be granted a mandatory injunction requiring defendant to ship the horse in accordance with their agreement, and enjoining other disposition of him.

Upon giving a bond a receiver of the stallion will be appointed with power to take appropriate steps, in California or elsewhere, and to invoke the aid of any court to gain possession of the horse, and ship him to plaintiff's stock farm, to which place he should have been sent in August or September, 1920.

MOTION for an injunction.

Kalish & Kalish (Charles A. Kalish, of counsel), for plaintiff.

Thomas F. Kane and John B. Dahlgren (Thomas F. Kane, of counsel), for defendant.

FORD, J. Plaintiff is a resident of New York and the defendant of California. Each owns a half interest in the thoroughbred stallion Friar Rock. which the plaintiff now values at $250,000. In fact the defendant paid the plaintff $30,000 for a half interest in the horse more than two and a half years ago.

Under the written agreement of sale dated June 29, 1918, the defendant was to have possession and use of Friar Rock in California during the seasons of 1919 and 1920, the plaintiff to have him for use in Kentucky during the seasons 1921 and 1922; "thereafter on new arrangements mutually satisfactory."

The season 1921 is now open or opening and



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plaintiff by the agreement is entitled in his turn to possess and use the stallion, but defendant flatly refuses to abide by his agreement unless the plaintiff enters into a new agreement which is unsatisfactory to him.

The defendant has utterly no right to insist upon any conditions of any kind for returning the horse to plaintiff except those expressed in the agreement of sale and those require his shipment forthwith to the plaintiff's stock farm in Kentucky. Indeed he has already been kept by the defendant so far beyond the reasonable time of shipment as to substantially prejudice the plaintiff's rights. The horse should have been sent in August or September of 1920 in order to get the stallion acclimated and fit for the season of 1921, during which the plaintiff is entitled to his possession.

Personal service of the summons upon the defendant has been made in this state and he has duly appeared by his attorneys. Upon the verified complaint and affidavits the plaintiff now asks for a mandatory injunction requiring the defendant to ship Friar Rock to Kentucky as provided in the agreement and enjoining other disposition of him; also for a receiver of the stallion with power to proceed to California and to take appropriate steps there or elsewhere, including the invoking of the aid of the courts of that or any other state, or of the Federal courts, to gain possession of the animal and ship him to the plaintiff's stock farm in Kentucky.

Plaintiff's application for relief is quite novel but so is the situation in which he finds himself. Already his rights have been prejudiced and further irreparable damage is threatening him. There must be a remedy and I do not believe this court is powerless to give it to him. The relief prayed for seems to be the most practicable and appropriate which is available to him.

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The courts of sister states may be relied upon to aid in serving the ends of justice whenever our own process falls short of effectiveness.

The motion will be granted and the amount of the receiver's bond will be fixed upon the settlement of the order.

Motion granted.

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PEOPLE ex rel. THE ASTORIA LIGHT, HEAT AND POWER COMPANY, Relator, *v.* JACOB A. CANTOR, RICHARD H. WILLIAM, ARTHUR H. MURPHY, GEORGE HENRY PAYNE, JAMES F. O'GRADY, JAMES P. SINNOTT and LEWIS M. SWASEY, Constituting the Board of Taxes and Assessments of The City of New York, Defendants.

(Supreme Court, New York Special Term, February, 1921.)

**Certiorari — taxes — debt due from United States not exempt — when proceeding to review an assessment for personal property will be dismissed — United States Revised Statutes, § 3701 — Tax Law, § 2(8).**

The unpaid balance of a debt which was due and owing from the United States, on October 1, 1919, on certain war contracts fully performed, is not exempt from taxation under section 3701 of the United States Revised Statutes but is an asset subject to municipal taxation under section 2(8) of the Tax Law of the state, for the year 1920, as a debt due from a solvent debtor, and proceedings on a writ of certiorari under section 12 of the Tax Law, to review an assessment which disallowed the deduction of such a debt, will be dismissed.

CERTIORARI proceedings.

Curtis A. Peters, for relator.

John P. O'Brien, corporation counsel (Max Solomon, of counsel), for defendant.

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LYDON, J. This is a certiorari proceeding brought to review personal property assessment of $1,458,300 for the year 1920, made by the defendants as tax commissioners of the city of New York against the relator herein pursuant to section 12 of the Tax Law.

There are no disputed facts. The relator, however, claims that the assessment is erroneous and should be reduced from $1,458,300 to $849,073.95 upon the ground that the defendants erroneously disallowed the deduction of the item amounting to $609,317.30 representing a debt due and owing from the United States government to the relator on October 1, 1919.

The question, therefore, to be determined by me is as follows: Is the debt of $609,317.30 due and owing from the United States government on October 1, 1919, which is the taxable status day for the year 1920, exempt from taxation on the ground as alleged by the relator that the same comes within section 3701 of the United States Revised Statutes?

The defendants contend that the item of $609,317.30 is a taxable asset in that it represents money due from a solvent debtor which is personal property as defined by section 2, subdivision 8, of the Tax Law, which provides as follows: "The terms 'personal estate' and 'personal property' as used in this chapter, include chattels, money, things in action, *debts due from solvent debtors,* whether on account, contract, note, bond or mortgage; * * *."

It is not contended by the relator that this item of $609,317.30 is not a debt due from a solvent debtor and therefore not properly included, but the claim is made that inasmuch as this indebtedness is due from the United States government as an unpaid balance on certain war contracts (which have been fully performed) it is exempt under section 3701 of the United States Revised Statutes, which provides

as follows: "All stocks, bonds, treasury notes and other obligations of the United States shall be exempt from taxation by or under state or municipal or local authority." Does this debt come within the meaning of the words " and other obligations of the United States " in the provision of that statute? The relator to support its contention refers at great length to the case of *Banks* v. *Mayor,* 7 Wall. 16, but that case involved the question as to whether certificates of indebtedness issued by the United States government were subject to local taxation, and the court held that they were not. There, supplies had been furnished to the United States government to enable it to carry on the war for the integrity of the Union, and certificates of indebtedness had been issued by the United States to the creditors in payment for the supplies, and under the terms of these certificates the government promised to pay the sums of money specified in them, with interest, at a time named. The court quite properly held that these certificates were beyond the taxing power of the states. In the instant case, the money owing by the United States government to the relator is not represented by any written instrument whereby the government promises to pay this amount, with interest, at a time named, and, therefore, in my opinion it is not the same kind of an obligation as the certificates of indebtedness. Furthermore, in the case of *People ex rel. Bank of New York* v. *Board of Supervisors, etc.,* 37 N. Y. 21, 23, the court expressed its view upon the meaning of the words " other obligations " when it used the following language in referring to the act of June 30, 1864, the phraseology of which is practically the same as that used in section 3701 of the Revised Statutes: " By that act the secretary was authorized to borrow $400,000,000 upon the credit of

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the United States, and to issue bonds therefor, and to issue $200,000,000 of treasury notes, both of said securities bearing interest and payable at a future day; and it was enacted that 'all bonds, treasury notes, and other obligations of the United States, shall be exempt from taxation.' This also, in my judgment, should be limited to the subject matter of the act, to wit: bonds and treasury notes, or, at the most, to the other bonds and treasury notes of the various kinds I have mentioned, which might be deemed '*other obligations*' of a like character. If it had been intended to exempt legal tender notes, apt words to describe them would have been used, or the notes in the act referred to would have been specified. It is inconceivable that congress should have continued to repeat and reiterate this exemption on six different occasions, if the acts of February 25, 1862, and of June 30, 1864, were intended to embrace all the securities or *obligations* of the United States in all *imaginable* forms."

Likewise in the case of *Hibernia Savings & Loan Society* v. *San Francisco*, 72 Pac. Repr. 920; affd., 200 U. S. 310, the court at page 922 said: "The statute relied on (Sec. 3701, U. S. Revised Statutes) was enacted simply in furtherance of the principle enunciated in *McCulloch* v. *Maryland*, (4 Wheat. 316, 4 L. Ed. 579), and to indicate the determination of congress that the usefulness of certain instruments as a means of carrying on the government would be enhanced by exemption from taxation. See *Bank* v. *Supervisors, supra.* The words 'and other obligations,' read in connection with the context, 'stocks, bonds, Treasury notes,' include only obligations of the government similar in character to those specifically named, *and given under the general power to borrow money* on the credit of the United States, and to *issue* in return

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therefor obligations in any appropriate form (see *Legal Tender Case,* 110 U. S. 421, 444; 4 Sup. Ct. 122, 28 L. Ed. 204), and do not include checks given in payment of such obligations."

The government must necessarily carry out a great many of its functions through contractors or agents, and simply because they are doing government work it does not necessarily follow that the money due them from the government in payment of such services or work performed is free from local taxation. Whether or not the agencies of the federal government are exempt from taxation by the state is dependent, not upon the nature of the agents, nor upon the mode of their constitution, nor upon the fact that they are agents, but upon the effect of the tax, that is, upon the question whether the tax does in truth deprive them of power to serve it, or hinder the efficient exercise of their power. A tax upon the property of the agents having no such necessary effect, and leaving them free to discharge the duties they have undertaken to perform may be rightfully imposed by the state. *Railroad Company* v. *Peniston,* 18 Wall. 5.

The taxing power exists in the state unrestricted by the Federal Constitution or government, except as to the means necessary to the latter to discharge its functions. There are many agencies of the federal government which do not enjoy any exemption whatever from taxation by the states, and they do not claim such exemption even in respect of property which they use when serving the government. Not a small portion of their earnings, and the dividends which they distribute among their stockholders, is derived from the government. They even pay to the state taxes upon those earnings.

In the case of *Railroad Company* v. *Peniston, supra,* at page 30, the court said: "While it is true *that*

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government cannot exercise its power of taxation so as to destroy the State governments, or embarrass their lawful action, it is equally true that the States may not levy taxes the direct effect of which shall be to hinder the exercise of any powers which belong to the National government. The Constitution contemplates that none of those powers may be restrained by State legislation. But it is often a difficult question whether a tax imposed by a State does in fact invade the domain of the General government, or interfere with its operations to such an extent, or in such a manner, as to render it unwarranted. It cannot be that a State tax which remotely affects the efficient exercise of a Federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the States all power to tax persons or property. Every tax levied by a State withdraws from the reach of Federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which Federal taxes may be laid. The States are, and they must ever be, coexistent with the National government. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the States, or prevent their efficient exercise."

And again, at page 36, the court said: "All State taxation which does not impair the agent's efficiency in the discharge of his duties to the government has been sustained when challenged, and a tax upon his property generally has not been regarded as beyond the power of a State to impose."

The fact that the contracts in evidence were for furnishing materials and doing work to carry on the war is of no moment, because these contracts were

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executed contracts, and the item of $609,317.30, the balance due on said contracts, is nothing more than a debt due from a solvent debtor, and in my opinion is taxable by the local authorities. It is hard to conceive how the taxation of this debt by the city of New York will in any way interfere with the federal government carrying on any of its functions.

Having held that the item in question is properly taxable, I deem it unnecessary to discuss the other points raised by the corporation counsel upon the trial. The certiorari proceedings herein are therefore dismissed, with costs.

Proceedings dismissed, with costs.

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MARTHA DIETRICH, an Infant, by GEORGE B. DIETRICH, her Guardian ad Litem, Plaintiff, *v.* PALISADES INTERSTATE PARK COMMISSION, Defendant.

(Supreme Court, New York Special Term, February, 1921.)

**Negligence — action for personal injuries — statutes — carriers — corporations — pleading — tort.**

An action against a common carrier to recover damages for personal injuries to a passenger is an action *ex delicto* and not *ex contractu.*

Where the complaint alleges that while plaintiff was a passenger on defendant's steamer, and without fault on his part, a door was closed on his hand by reason of the negligence of defendant, its agents, servants and employees, to his personal injury, for which he demanded judgment in a certain sum, the action is in tort.

An allegation that defendant, the "Palisades Interstate Park Commission," is a domestic corporation is subject to the modification that the court must take judicial notice of and review the statutes relating to defendant, its organization and purposes, precisely the same as if said statutes had been incorporated in the complaint.

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The fact that defendant by the statute creating it (Laws of 1900, chap. 170, and amendatory acts) was given express power to sue and be sued, does not subject it to liability to an individual for negligence in the performance of a public duty, and the complaint on demurrer will be dismissed, with leave to plaintiff to plead over on presentation of an affidavit showing facts that will enable him to overcome the defects in his pleading.

DEMURRER to complaint.

Arthur J. Levine, for plaintiff.

Barry, Wainwright, Thacher & Symmers (Herbert Barry and Joseph A. Warren, of counsel), for defendant.

LYDON, J. This is a demurrer to a complaint brought on for trial as a contested motion. The defendant demurs to the complaint upon three grounds: (1) That it appears upon the face of the complaint that the court has not jurisdiction of the person of the defendant; (2) that the court has not jurisdiction of the subject of this action, and (3) that the complaint does not state facts sufficient to constitute a cause of action. The complaint alleges that the defendant is a domestic corporation; that it is the owner of the steamer *Clermont*; that it operated the said steamer as a common carrier of passengers for hire; that on a certain date while the plaintiff was a passenger for hire on the defendant's said steamer, and which said steamer was proceeding from Bear Mountain to New York city, a door of said steamer was closed on the plaintiff's hand, without any fault on the part of the plaintiff and by reason of the negligence of the defendant, its agents, servants and employees, and thereby the plaintiff was injured, and damages are prayed for in the sum of $5,000.

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The complaint sets up only that the plaintiff was a passenger and was injured by the negligence of the defendant's agents. No breach of contract is alleged. I am, therefore, obliged to hold that the action is in *tort* notwithstanding the claim of the plaintiff that it is an action on contract. It is now well settled that an action against a common carrier for personal injury to a passenger by negligence, where no contract is specifically pleaded, is an action *ex delicto* and not *ex contractu,* although the complaint may allege that the plaintiff held a ticket for transportation. In the case of *Atlantic & Pacific R. R. Company* v. *Laird,* 164 U. S. 393, in an opinion written by Chief Justice White, it was stated "The doctrine is very clearly expressed in *Kelly* v. *Metropolitan Railway Company* (1895), 1 Q. B. 944, where the Court of Appeals held that an action brought by a railway passenger against a company for personal injuries caused by the negligence of the servants of the company, while he was traveling on their line, was an action founded upon tort."

Having thus determined that the action as alleged in the complaint is founded upon tort, I now approach the question, whether the plaintiff has the right to institute such an action against the defendant. The allegation that the defendant herein, the Palisades Interstate Park Commission, is a domestic corporation is subject to the modification that the court must take judicial notice of the statutes relating to the defendant, its organization and its purposes, and to review them precisely the same as if incorporated in the complaint. A consideration of these statutes shows that the members of the defendant commission are appointed by the governor (Laws of 1900, chap. 170, § 1) to acquire and maintain an interstate park for the enjoyment of the public, and to provide and main-

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tain means of transportation to and from it in order to make it accessible to the public. Laws of 1900, chap. 170, § 2, as amd. by Laws of 1915, chap. 562 and Laws of 1920, chap. 283; Laws of 1900, chap. 170, § 4, as amd. by Laws of 1906, chap. 691, and Laws of 1910, chap. 361; Laws of 1900, chap. 170, § 5, as amd. by Laws of 1906, chap. 691, Laws of 1910, chap. 361, and Laws of 1917, chap. 168. The defendant is, therefore, conducting this interstate park and operating the steamer *Clermont* not for private gain but as a public enterprise under legislative authority to entertain the public; it is a state agency charged with a public duty. It performs no private functions; the commissoners are not even compensated. In the matter herein the defendant was acting within its statutory authority. It therefore clearly appears that the action is against the state. In the case of *Di Marco* v. *State of New York,* 110 Misc. Rep. 426, the court said: "It is a well settled principle of law that the state in consequence of its sovereignty is immune from prosecution in the courts and from liability to respond in damages for negligence except in those cases where it has expressly waived immunity or assumed liability by constitutional or legislative enactment."

Likewise in the case of *Sipple* v. *State of New York,* 99 N. Y. 285, 287, the court said: "It must be conceded that the State can be made liable for injuries arising from the negligence of its agents or servants, only by force of some positive statute assuming such liability." This doctrine was further securely established in the case of *Locke* v. *State of New York,* 140 N. Y. 480, 481, when the following language was used by the court: "The sovereign cannot be impleaded nor made liable in damages for any cause whatever in the courts of justice, save in such cases as it has itself consented to be made liable."

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Upon the aforementioned authorities, the defendant herein, in the absence of clearly expressed statutory consent to liability, is not liable. No such consent is shown by the plaintiff, nor do I find any in the statutes. I do find, however, that the Palisades Interstate Park Commission created by the Laws of 1900, chapter 170 (amd. by Laws of 1914, chap. 15; Laws of 1915, chap. 562, and Laws of 1920, chap. 283) has been given express power to sue and be sued, but I do not believe that this power subjects it to liability to an individual for negligence in the performance of a public duty, *Stephens* v. *Commissioners of Palisades Interstate Park,* 108 Atl. Repr. 645; *Freeholders* v. *Strader,* 18 N. J. Law, 108.

I conclude, therefore, that the defendant is not liable in this action. The demurrer to the complaint is sustained, with ten dollars costs, upon all of the grounds advanced by the defendant, and complaint dismissed, with costs, with leave to the plaintiff, however, to plead over within ten days after the service of a copy of the order to be entered hereon, with notice of entry thereof, upon payment of said motion costs, provided the plaintiff presents, upon settlement of the order, an affidavit showing facts which will enable him to overcome the defects in the pleading.

Ordered accordingly.

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GEORGE B. DIETRICH, Plaintiff, *v.* PALISADES INTERSTATE PARK COMMISSION, Defendant.

(Supreme Court, New York Special Term, February, 1921.)

See *Dietrich* v. *Palisades Interstate Park Commission,* immediately *ante.*

DEMURRER to complaint.

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Arthur J. Levine, for plaintiff.

Barry, Wainwright, Thacher & Symmers (Herbert Barry and Joseph A. Warren, of counsel), for defendant.

LYDON, J. This is a demurrer to a complaint brought on for trial as a contested motion. The complaint states a cause of action brought by the father for the loss of services and earnings of his infant daughter, and also for expenses incurred as a result of the injuries the said infant daughter received while a passenger on the steamer *Clermont,* alleged to be owned and operated by the defendant. The facts, as well as the grounds of the demurrer, are precisely the same as in the case of *Dietrich* v. *Palisades Interstate Park Commission,* the decision in which is handed down herewith. I make my opinion in that case stand as my determination in this case.

Ordered accordingly.

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GEORGE DOUGLAS MILLER, Plaintiff, *v.* EDWARD S. WALSH, Individually and as Superintendent of Public Works of the State of New York, Defendant.

(Supreme Court, Monroe Special Term, February, 1921.)

**Injunctions — summary appropriation by the state of disputed land, under Laws of 1911, chap. 746, for canal uses, is a complete answer to a motion to continue an injunction.**

The rule that a public body may not institute proceedings under the Condemnation Law to condemn property which it claims to own, is not operative as against the state in its appropriation of lands for canal terminal uses.

Several notices sent by the state superintendent of public works to plaintiff directing him to remove that part of a build-

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ing which he claims to own, but which the state claimed encroached upon canal lands, was followed by a letter of advice to the effect that in the case of plaintiff's refusal or failure to make such removal, the department of public works would cause the same to be demolished and removed at plaintiff's expense. *Held,* that the summary appropriation by the state of the portion of land in controversy, made pursuant to statute (Laws of 1911, chap. 746) for Barge canal terminal uses, was a complete answer to a motion to continue an injunction theretofore procured by plaintiff in an action brought to restrain the defendant individually and as superintendent of public works from entering upon the premises until the further order of the court.

Plaintiff's reliance upon the Statute of Limitations to buttress his claim, if his title should otherwise fail, does not change the situation, and he runs no hazard of being unjustly deprived of any advantage attaching to his claim of ownership to the land in dispute, and his rights are securely safeguarded against infringement without the protection of an injunction.

MOTION on behalf of the plaintiff, brought on upon an order to show cause why the injunction granted herein should not be continued until the issues in this action between the plaintiff and the defendant shall have been finally determined.

Joseph W. Taylor and Thomas J. Hargrave, for plaintiff.

Charles D. Newton, Attorney-General (Edward J. Mone, Deputy Attorney-General), for defendant.

STEPHENS, J. This action was brought to restrain the defendant from interfering in any way with the property which the plaintiff claims to own, situated upon the southwest corner of South avenue and Court street, in the city of Rochester, and which is bounded on the west by the east line of the prism of the Erie canal.

The state of New York claims that the building on said premises encroaches upon the canal lands, and in

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August, 1920, the defendant notified the plaintiff of such claim and directed him to remove the part of the building on its land on or before September first; notice of like import was given in December, requiring that the removal be made on or before January 15, 1921; these notices were followed by a later one in December advising the plaintiff that if he refused or failed to remove the offending structure the department of public works would cause the same to be demolished and removed at his expense; on January 13, 1921, the plaintiff procured an injunction in this action restraining the defendant from entering upon said premises until the further order of the court, together with the order to show cause why the said injunction should not be continued; the motion was heard on January twenty-ninth and submitted on briefs February twelfth.

Since the injunction was obtained and after the moving papers were served the state appropriated that portion of the land in controversy pursuant to chapter 746 of the Laws of 1911 for the purposes of the Barge canal terminal at Rochester and the defendant sets up this appropriation as a complete answer to the plaintiff's motion.

Upon the appropriation map, following the description of the property appropriated, is the statement that "nothing herein contained shall be construed as an admission by or on the part of the state of title to said parcel in any party other than the State of New York, the state on the contrary contending that said parcel is within the canal Blue Line and is its property."

This assertion of title in itself upon the appropriation map the plaintiff earnestly insists defeats the purpose of the state and that the defendant, therefore, is unaided by its action, founding his argument upon

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the proposition that the state or any other public body cannot institute condemnation proceedings to secure possession of property that it owns or claims to own. *Matter of City of Yonkers,* 117 N. Y. 564; *Matter of Village of Olean,* 135 id. 341; *City of Geneva* v. *Henson,* 195 id. 447. The general principle for which the plaintiff contends is supported by the authorities cited and it indeed is re-affirmed in *People ex rel. Palmer* v. *Travis,* 223 N. Y. 150, an authority upon which the defendant confidently relies.

The position of each party here is fortified by well reasoned argument and our problem is to discover whether the plaintiff can successfully prevent the summary appropriation by the state of the property which each claims to own until after the conflicting claims to title have been settled in this litigation because of the assertion by the state of its claim to ownership in the initial notice of appropriation and whether the state is limited in taking property for canal terminal purposes by the same rules that are applicable in proceedings under the Condemnation Law.

Section 8 of chapter 746 of the Laws of 1911 provides that: "The state engineer may, with the approval of the canal board * * * enter upon, take possession of and use lands, structures and waters * * * the appropriation of which for the barge canal terminals * * * shall in his judgment be necessary". After compliance with certain requirements specified in the statute, all of which have been duly observed in this instance including service upon the plaintiff of the notice of appropriation with a map of the property taken, "the entry upon and the appropriation by the state, of the property described * * * shall be deemed complete and such notice so served shall be conclusive evidence of such entry and appropriation and of the quantity and boundaries of the



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property appropriated." *Kahlen* v. *State of New York*, 223 N. Y. 383. The statute further provides that: "The court of claims * * * shall have jurisdiction to determine the amount of compensation for lands, structures and water so appropriated."

It was held in the *Palmer* case, above referred to, that the above quoted provision of the statute relating to the jurisdiction of the Court of Claims was not a limitation upon the general jurisdiction of the court elsewhere conferred, and that the court had jurisdiction to determine the title to land so taken as between question of title but their inquiry is restricted to the the state and a rival claimant.

The established rule that a public body may not institute proceedings under the Condemnation Law to condemn property which it claims itself to own is a rule of necessity, for the commissioners appointed in such proceedings are not authorized to pass upon the amount of compensation to be awarded. *City of Geneva* v. *Henson*, 195 N. Y. 447. This rule, however, is not operative as against the state in its appropriation of lands for canal terminal uses for as a part of the plan in which the state is permitted summarily to take possession of real property all questions relating to title between the state and reputed owners and the compensation to be given are placed within the jurisdiction of a constituted tribunal to determine.

The conclusion which our discussion anticipates finds further support in *First Construction Co.* v. *State of New York*, 221 N. Y. 295; *Miller* v. *State of New York*, 164 App. Div. 522; affd., 223 N. Y. 690.

In the first of the cases last above cited the appropriation was of "all the right, title and interest not belonging to the State of New York" in the described premises, the state asserting by inference, at any rate, some title or interest in them; in the second, the notice

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of appropriation states "it being contended that title to said land is and has heretofore been in the State of New York and John F. Miller and Dugald C. McIntyre claiming to own the whole or some part thereof, now, whatever rights, title or interest if any therein are held or owned by them are appropriated * * *;" the language used being not essentially different from that which is now under scrutiny; in the one case the title of the claimant was partially and in the other wholly denied; in *Palmer* v. *State of New York*, 174 App. Div. 933; affd., 220 N. Y. 565, the proceeding before the Court of Claims that gave rise to the later case mentioned above, the state neither directly nor by inference upon its appropriation map claimed to own any part of the real property or interest therein involved; however, during the course of the hearing before the referee to whom the matter of title, among other things, was referred to be determined it did claim some interest adverse to the plaintiff's ownership; the right of the state, therefore, to try its title to lands that may have been appropriated by it has the sanction both of a recognized practice and of authority; it is a matter of indifference, in my opinion, when the state asserts its claim to title whether at the initiation of the proceedings in its notice of appropriation or later when the parties are before the court for the adjudication of their respective interests; if such claim is omitted from the notice it can, nevertheless, be asserted in the Court of Claims, and if alleged in the notice the subsequent procedure is necessarily no different, for "where the state claims title to any lands which under its appropriation map it has assumed to take, this queston of title must necessarily be settled before any award can be made" (*People ex rel. Palmer* v. *Travis, supra*), and practically, if the plaintiff owns the property he

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will be compensated for it, if he does not own it the state simply comes into its own; the appropriation of the premises in question by the state is inevitable, whoever the owner may be, and if the plaintiff should succeed in this action, the injunction continuing, the amount of the compensation would be fixed in precisely the same manner after the determination of any issues involved here as before such determination.

The plaintiff's reliance upon the Statute of Limitations, to buttress his claim if his title should otherwise fail, does not change the situation, for in whatever manner the title of the plaintiff may be supported, whether by adverse possession or by the record, it is determinable in the Court of Claims; moreover, title by prescription as against the state is but little esteemed in the authorities. *Fulton Light, H. & P. Co.* v. *State of New York,* 200 N. Y. 400.

I conclude that the plaintiff runs no hazard of being unjustly deprived of any advantage attaching to his claim of ownership to the real property and that his rights are securely safeguarded against infringement without injunctive protection.

The motion is denied.

Motion denied.

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ARTHUR L. VAN ETTEN and MEDRIC TRUDEAU, Plaintiffs, *v.* SPHINX HOLDING CORPORATION et al., Defendants.

(Supreme Court, Monroe Special Term, February, 1921.)

**Mechanics' lien — foreclosure — motions for leave to serve supplemental answer and to intervene denied.**

The final judgment in an action to foreclose a mechanics' lien, from which no appeal was taken, directed that the amount

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of the liens of the several defendant lienors be first paid, then the amount of plaintiffs' lien, the surplus, if any, to be paid into court. After the entry of said judgment the directors of the defendant owner, upon the affirmance of a judgment recovered against them on their written guaranty that a first mortgage upon the premises would be procured and a portion of the net proceeds paid to the contractor, paid the judgment. *Held*, that a motion by the defendant owner for leave to serve a supplemental answer and a motion by said directors for leave to intervene, both motions being predicated upon the fact of the payment of such judgment, will be denied.

The defendant lienors, whose rights in the real property, as finally adjudicated in the lien action, are superior to those of the others, have no concern with the differences among the others, except that they be no longer delayed in securing the fruits of their litigation.

MOTION on behalf of the above named defendant for leave to serve a supplemental answer herein and on behalf of Charles M. Hirschfelder and ten others for leave to intervene and become parties defendant.

Herbert J. Stull (Percival D. Oviatt, of counsel), for defendant Sphinx Holding Corporation and said proposed intervenors.

William MacFarlane, for plaintiffs, and upon this motion for all the defendants other than Sphinx Holding Corporation and Frank Strauss.

Charles B. Bechtold, for defendant Frank Strauss.

STEPHENS, J. This action was commenced in January, 1918, for the purpose of foreclosing the plaintiffs' mechanics lien upon premises owned by the defendant Sphinx Holding Corporation; the other defendants were also lienors; the action was tried March 17 and 18, 1919, and the questions involved were afterwards submitted upon written briefs;

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memorandum of decision in favor of the plaintiffs was filed in August, 1919, which detailed all of the essential facts found and directed formal findings to be prepared as indicated in the memorandum; the findings were presented for signature on May 25, 1920, and the final decree was entered on that day, establishing the lien of the plaintiffs and the liens of some of the defendants and containing the usual directions to sell the premises to satisfy the liens; no appeal has been taken from that judgment and the premises have been advertised for sale.

It is the situation thus briefly summarized that the defendant corporation and the proposed intervenors seek to disturb by reason of other facts which it is now necessary to consider.

The plaintiffs in this action and the Sphinx Holding Corporation entered into a contract April 14, 1917, by which the plaintiffs agreed to put up a building upon real estate owned by the said defendant at a stipulated price; the contract provided that as soon as the roof was on the building the owner would apply for and secure a first mortgage on the property for at least $12,000, the net proceeds of which, after paying a mortgage on the building lot for $1,150, would be paid to the plaintiff contractors. In the performance of this contract the liens involved in this action had their rise.

The proposed intervenors, who were directors of the Sphinx Holding Corporation, guaranteed, in writing, the execution of the building contract "in the following particulars, *First:* that the mortgage will be procured upon said premises as provided in said contract and the proceeds thereof paid to the contractor as therein mentioned."

The roof was on the building on or about August 27, 1917, but no money was procured by mortgage or

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otherwise and no payment was made to the plaintiffs upon the contract at that time or at any other time, except a small sum negligible for our present purpose.

In July, 1918, the plaintiffs herein commenced an action at law against the proposed intervenors upon their guaranty; the first trial resulted favorably to the defendants; upon appeal the plaintiffs' exceptions were sustained and a new trial granted; on the second trial a verdict was directed in favor of the plaintiffs for an amount equivalent to the net proceeds of the twelve thousand dollar mortgage with interest from August 27, 1917; after the affirmance on appeal of the judgment entered upon the verdict and on or about October 16, 1920, the said proposed intervenors, the defendants in that action, paid the judgment; it is upon this fact of payment that the Sphinx Holding Corporation founds its application to serve a supplemental answer in this action and the proposed intervenors predicate their right to intervene.

A better understanding of the problem can perhaps be had by having in mind the relative stages of these two actions during their parallel course through the court.

The foreclosure action was first commenced; the action at law was first tried and the plaintiffs were unsuccessful; this action to foreclose the liens was tried and the memorandum of decison filed favorable to the plaintiffs, while an appeal was pending from the determination of the trial court in the action brought upon the guaranty; the second trial in the last mentioned action in which the plaintiffs were successful and the appeal were had during the period that elapsed after decision in the lien action was rendered and the entry of judgment in it; the time came, therefore, when the plaintiffs had a favorable judgment in both the action upon the guaranty and that

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upon their lien; their lien having been established for the value of all the labor and material that entered into the building it is obvious that they had secured double relief, in appearance at least, and practically so if the real estate were of sufficient value to satisfy their lien and the costs and expenses of the action brought to foreclose it; in this state of the relations between the parties concerned the proposed intervenors paid the judgment against them.

It was suggested upon the argument that it was neither necessary nor proper upon this motion to determine what the equities of the moving parties are, but only to grant the relief asked for and leave for later decision, after further inquiry, the merits of the controversy. *Johnston* v. *Donvan,* 106 N. Y. 269, is cited in support of that proposition; the facts in that case and in this are widely different; there the application was made before the time to answer had expired and evidently questions of fact needed to be determined on common-law evidence; here, all the facts have been adjudicated, the action has proceeded to final judgment, and that judgment has settled the interests of all the parties in the property beyond the hazard of interference; these fixed rights ought not to be swept aside and the entire litigation in which they were established abrogated unless there be a very clear comprehension that the claims of the proposed intervenors are rooted in very definite and precise equities.

The answers which the moving parties seek to interpose are not a part of the papers before me, but the desire of the corporate defendant is "to file and serve an amended supplemental answer" and that of the proposed intervenors is "to come in as parties defendants to the action and to file and serve answers herein setting up such rights as they may have or claim to

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have in respect to the real property in and by said judgment herein directed to be sold."

The only fact that the Sphinx Corporation could properly plead would be that the first installment on the contract price of the building has been paid to the plaintiffs and the proposed intervenors could only be heard to say in their answers that they paid it; whatever rights, therefore, the moving parties have acquired since the final determination of the two actions are such as arise between themselves and the plaintiffs; the skein is further untangled by the circumstance that the rights of the proposed intervenors are derivative from those of the defendant corporation; by the payment of the judgment against them they became entitled to be subrogated to the rights of the defendant owner, and to the security held by the plaintiffs for the payment of the owner's debt. *United States F. & G. Co.* v. *Carnegie Trust Co.*, 161 App. Div. 429; affd., 213 N. Y. 629.

They are in no different position than an owner who makes a payment to a contractor or one who makes advances upon a mortgage with knowledge that notices of lien have been filed; such payments and advances are made at the peril of those making them and do not affect the remedy of the lienor. Lien Law, §§ 11, 13; *Foshay* v. *Robinson*, 137 N. Y. 134; *Gass* v. *Souther*, 46 App. Div. 256; affd., 167 N. Y. 604; *Upton Co.* v. *Flynn*, 169 App. Div. 79.

The moving parties claim the absolute right to be allowed to set up their alleged defenses under section 452 of the Code of Civil Procedure. *Uhlfelder* v. *Tamsen*, 15 App. Div. 436, upon which they rely does not sustain that position; at most it holds that where the right to intervene is absolute no conditions can be imposed; we are not confronted here, in my opinion, with a situation that is governed by the imperatives of

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the statute; the Sphinx Corporation is already a party to the action and the complete determination of the action could be had and has been had without the presence of the proposed intervenors as parties; they do not come within the description of "persons not parties, whose rights must be ascertained and settled before the rights of the parties to the suit can be determined." *Chapman* v. *Forbes,* 123 N. Y. 532, 538. The dictum in *Drake* v. *New York Suburban Water Co.,* 36 App. Div. 275, had no application to the decision in that case and has no more in this one. *Winfield* v. *Stacom,* 40 App. Div. 95, holds only that specific liens upon undivided shares of parties to a partition action should be determined before interlocutory judgment instead of after and that a mortgagee, whose mortgage is subsequent to the commencement of the action, has a right to be made a party before interlocutory judgment.

The judgment in this action directs that from the net proceeds of the sale of the real estate the amount of the liens of the several defendant lienors be first paid; then the amount of plaintiff's lien, less the sums so first directed to be paid, and that the surplus, if any, be paid into court; as above suggested the controversy afterward arising is limited to the plaintiffs, the defendant owner and the proposed intervenors; the defendant lienors, whose rights in the real property as finally adjudicated are superior to those of the others, have no concern with the differences among the others except that they themselves be not longer delayed in securing the fruits of their litigation.

It follows, leaving out of consideration the laches of the applicants, that the coveted privilege to intervene and the defendant owner's request to set up the payment of the judgment in the action at law as a defense, must be denied.

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It may or may not be profitable to prolong the discussion to indicate what might have been done or remains yet to do to ameliorate the hardship of the proposed intervenors' position.

An action in equity to foreclose a mechanic's lien and an action at law to recover the debt, which the notice of lien was filed to secure, are concurrent remedies; there may be two judgments but there can be but one satisfaction of the debt. *Robinson* v. *Fay*, 19 N. Y. Supp. 120; *Raven* v. *Smith*, 87 Hun, 90; *Bryson* v. *St. Helen*, 79 id. 167; *Matter of Gould Coupler Co.*, Id. 206; *Smith* v. *Fleischman*, 23 App. Div. 355.

The proposed intervenors are not necessarily remediless; the moneys remaining from the proceeds of the sale after the defendant lienors are paid pursuant to the judgment belong equitably to them, to the extent of their just claim; these moneys will consist of the difference between the amount required to pay said defendants and the amount of plaintiffs' lien together with the surplus; in this fashion they would get the benefit of subrogation to the rights both of the defendant owner and of so much of the plaintiffs' security as is available; if nothing can be realized from these sources because of the inadequacy of the value of the property the only resort would be to the judgment for deficiency against the owner and perhaps to an action against the plaintiffs; how practical these suggestions may prove to be depends upon the value of the property; and the solvency of the plaintiffs and defendant owner.

No useful purpose will now be served by indicating what remedies were permissible in the earlier stages of this dual litigation.

The motion is denied, with ten dollars costs.

Motion denied, with ten dollars costs.

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MATILDA KIBNER, Claimant, v. STATE OF NEW YORK.

Claim No. 16513.

(State of New York, Court of Claims, February, 1921.)

**Highways — injury sustained by fall on privately constructed sidepath — state not liable.**

Claimant, while walking on a sidepath along a public highway constructed by the state and maintained under the patrol system, caught her foot on a flagstone covering a sluiceway under the sidepath which had been constructed many years ago by residents in the vicinity for their own convenience and used quite extensively by pedestrians, and as a result she fell and broke her arm. *Held*, that the state was not liable and a claim for damages will be dismissed.

CLAIM for personal injuries.

Michael D. Nolan, for claimant.

Charles D. Newton, Attorney-General (Glenn A. Frank, Deputy Attorney-General, of counsel), for state.

SMITH, J. On September 28, 1919, the claimant, who was walking on a sidepath along a public highway, in the town of North Greenbush, in the county of Rensselaer, caught her foot on a flagstone covering over a sluiceway under the sidepath, fell and broke her arm. She has filed this claim against the state for damages, claiming that the sidepath was in an unsafe condition, due to the negligence of the state.

For many years there has been a public highway at this location, leading from Pawling avenue in the city of Troy, to Wynantskill. In the year 1902 the state of New York, pursuant to the provisions of the Highway

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Law, constructed an improved highway with macadam pavement, the center line of which was the center line of the old highway.

Later, and in the year 1914, this county highway was reconstructed by the state with a brick pavement. The width of the improved road constructed by the state including shoulders was about twenty-four feet.

Adjoining this improved roadway and to the south thereof and running parallel therewith was a ditch of a width at the top of about seven feet and southerly of the ditch was the sidepath, about five feet in width, where claimant was walking at the time of the accident.

At the time of the accident the county highway constructed by the state was being maintained under the patrol system. Neither the sidepath nor the sluiceway under it was built or maintained by the state, having been constructed many years ago by residents of the town of North Greenbush living in the vicinity, for their own convenience, and it was used quite extensively by pedestrians travelling along the highway.

In this situation the state is not liable for the consequences of claimant's accident. Neither the sidepath nor the sluiceway under it was a part of the county highway which the state had constructed and the maintenance of which it had undertaken. The state is not liable in tort except where liability has been assumed by statute. *Smith* v. *State of New York*, 227 N. Y. 405.

By section 176 of the Highway Law the state has assumed liability for damages caused by defects in state and county highways maintained by the state by the patrol system.

County highways are defined by subdivision 2 of section 3 of the Highway Law as "those * * * constructed or improved at the joint expense of state,

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county and town, or state and county, as provided by law."

The effect of these provisions of the Highway Law is to limit the liability which the state has assumed to the consequences resulting from defects in the highway which it has constructed and the maintenance of which it has undertaken, and also from conditions affecting public travel thereon. Thus, it has been intimated that the state would be liable for the consequences of a defect in a wooden driveway or approach across a ditch bordering an improved county highway, resulting in damage to one using the improved highway. *Ferguson* v. *Town of Lewisboro,* 213 N. Y. 141.

Were it otherwise, and were the state to be held to have succeeded to all the liability with respect to this highway of the town of North Greenbush, still it would not be liable. The Town Law has imposed upon town superintendents of highways no duty to construct and maintain sidewalks nor charged them with any duty with respect thereto. It may be, that if a town does actually construct a sidewalk along a public highway, it will be charged with the duty of maintaining it in safe condition for public use so long as it is permitted to exist (*Birngruber* v. *Town of Eastchester,* 54 App. Div. 80); but in this case, as we have seen, the construction and maintenance of this sidepath had been a purely private enterprise.

The motion made by the counsel for the state at the close of the case, to dismiss the claim, upon the ground that the facts as shown give rise to no valid claim against the state of New York, should be granted and the claim dismissed.

WEBB, J., concurs.

Claim dismissed.

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# WILLIAM M. JONES, Plaintiff, v. ALFRED COCOMITROS, Defendant.

(County Court, Jefferson County, February, 1921.)

**Lease — when provisions of old lease not incorporated in renewal lease — landlord and tenant — summary proceedings.**

Where the provisions of an old lease are continued in a new lease by reference only, a provision of the former lease for a renewal of the term is not incorporated in the new lease, unless that intention is clearly expressed. (P. 451.)

Where the right to a renewal of a five-year lease has been lost by failure to give the proper notice for an extension of the term, and the assignee of all the tenant's rights, without objection on the part of the landlord, continues in possession of the premises for one month beyond the term, a new lease given to him for five years from the expiration of the old lease, containing no specific provision for a renewal, is only a lease for a term of five years, even though the provisions of the old lease by reference are incorporated in the new one, which declares that it was intended as a renewal of the old lease. (Pp. 450, 451.)

Where in summary proceedings instituted against the assignee of the lease as a holdover, his only claim is that by the terms of the new lease he was entitled to at least a further term of two years, the landlord will be granted a final order awarding him possession of the premises. (Pp. 450, 452.)

SUMMARY PROCEEDINGS for possession of premises, expiration of term.

Purcell, Cullen & Pitcher, for petitioner.

Thomas Burns, for defendant.

CONBOY, J. The facts were stipulated and the only question to be determined is the proper construction of the lease between the parties.

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Harriet V. Smith in her lifetime owned a block on the public square in the city of Watertown, N. Y., consisting of basement, ground floor and upper floors. On November 23, 1910, she rented the first floor and basement to one Kachivelos to be used as a store for the term of five years from January 1, 1911, for $1,800 per year, payable monthly in advance. The lease contained numerous terms and conditions; such as what the premises were to be used for, the payment of taxes, the removal of stairs, the surrender of the premises at the expiration of the term and other matters. It then contained the following provision: "The parties of the first part further agree that at the expiration of the above term they will extend this lease for a period of two years upon the same terms and conditions as herein stated, providing they receive from the second parties a six months' written notice that they desire a continuation of the lease and the said first parties do further agree that if said two years' extension be made, that they will upon the same notice at the expiration of that period, make a further extension of three years of this lease upon the same terms and conditions herein provided, except as to the amount of the rental thereof, which shall at that time, to wit, seven years from January 1, 1911, be readjusted."

On July 21, 1911, Kachivelos assigned all his interest in the lease to the defendant with the consent of Harriet V. Smith. It was agreed in the assignment that the assignee was to keep and perform all the conditions of the lease made by the assignor.

The defendant went in possession under the assignment and continued thereunder until February 1, 1916, which was one month after the expiraton of the term. He did not give the six months' notice provided in the lease for a renewal. On that day, February first, Mrs.

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Smith and the defendant executed an agreement for the rental of the same premises for a period of five years from January 1, 1916. The agreement stated that the lease of 1910 had expired January 1, 1916, and contained a further proviso that "the parties were desirous of *renewing* the lease." It contained the following clause which the court is asked to construe: "The party of the first part (Smith) does lease and demise unto the said party of the second part the premises described in said lease, dated November 23, 1910, for a period of five years from January 1, 1916, on the same terms and conditions as expressed in said lease aforesaid, and each of the parties hereto do hereby promise and agree to be governed by and to comply with said terms and conditions as if said terms and conditions were set forth in detail herein."

Mrs. Smith died intestate August 19, 1919, leaving two children of full age as her only heirs at law. On December 3, 1919, the heirs, as owners, rented the whole block, including the premises in question, to the Alling Rubber Company subject to the defendant's lease for the term of five years from January 1, 1920, at the agreed rental of $2,608 for the first year and $4,000 per year for the remaining four years, payable monthly in advance, with the privilege of a renewal for five years longer at $4,500 per year. The lease to the rubber company contained a covenant on the landlord's part that the defendant's lease would expire January 1, 1921, and that there was no right of renewal.

Shortly after the execution of the lease to the Alling Rubber Company the defendant was notified in writing by the owners to pay that company the rent for the occupied premises; was advised of the last mentioned lease and since that time the defendant has



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paid the rent to that company. The heirs notified the defendant that the lease of February 1, 1916, would expire January 1, 1921. The defendant notified the heirs by proper notice of his desire to continue the lease and duly complied with the provisions of the first lease as to such notice.

Shortly after the alleged expiration of the defendant's lease, the petitioner, as agent of the Alling Rubber Company, began this proceeding against the defendant by petition and precept and claimed that the defendant's lease of February 1, 1916, expired January 1, 1921. The defendant served an answer claiming in substance that by the terms of that lease he was entitled to at least two years' further extension.

It will be noticed that while the agreement of February 1, 1916, provides for a rental period of five years on the same terms and conditions as the first lease, there is no mention of a renewal term except as the same may be inferred. No question is raised that all the provisions of the first lease are incorporated in the new lease except the right of renewal.

No proof was given showing the intention of the parties except as the same may be spelled from the leases themselves. The defendant was entitled under the first lease by serving the proper notice to an extension of two years and possibly five years. By failing to serve the notice the right of extension was lost. He, however, continued in possession for one month without objection from the landlord. The tenant was, therefore, bound for another year. Whether the landlord was also bound is left in doubt by the agreed statement of facts. *Schuyler* v. *Smith,* 51 N. Y. 309; *Smith* v. *Littlefield,* Id. 539. It will be assumed, however, that the defendant had the right to hold over until January 1, 1917. Instead of relying upon that right the

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parties executed another agreement to extend the period for five years from January 1, 1916, under the same terms and conditions which gave to the defendant all he could by any possibility be entitled to under the terms of the first lease. Whether the agreement of February first was a new lease or simply a renewal lease will to my mind make considerable difference with the law of the case.

Where parties make an entirely new contract and incorporate by reference all the terms and conditions of another paper, it would seem that all substantial covenants are presumed to be inserted, but in the case of a renewal lease of premises, and the provisions of the old lease are continued in the new by references only, it does not incorporate the renewal provisions of the old lease unless that intention is clearly expressed. I conclude that the lease of February first was intended as a renewal lease in view of the fact that the parties themselves called it such. There being no specific provision in the second lease for a renewal it would seem to be the intent of the parties that the term would end on January 1, 1921. Under the old lease the defendant had the possible right to a continuance for ten years. By the execution of the February first lease he had the absolute right to the full term of ten years in all; five years under the first lease and five years under the lease in question. The latter term was in fact a renewal. It would seem that if the parties intended that the defendant was to have a further term of two and possibly five years, it would have been so stated.

The conclusion I have reached is sustained by authority. *Carr* v. *Ellison,* 20 Wend. 177; *Winslow* v. *B. & O. R. R. Co.,* 188 U. S. 646; *Muhlenbrinck* v. *Pooler,* 40 Hun, 526; *Pflum* v. *Spencer,* 123 App. Div. 742; *Cunningham* v. *Pattee,* 99 Mass. 248; *Syms* v. *City of New*

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*York*, 105 N. Y. 153; Chaplin Landl. & Ten. 230. Those cases determine the doctrine under the circumstances of this case that only one renewal was intended and that the defendant has already had. Chaplin on Landlord and Tenant, *supra*, states the doctrine succinctly: "A covenant to renew a lease means to renew it once, and not to renew it from time to time forever. In other words, under such a covenant the renewal lease need not contain a renewal clause. This principle applies even though the covenant is to renew 'under the same covenants as in the original lease' this provision contemplating a renewal upon the same covenants excepting the covenant for a renewal."

It seems quite clear that it was the intention of the parties when the February first agreement was made to lease the premises to the defendant for a term of five years only, without the privilege of a further renewal and consequently the defendant's term expired January 1, 1921. He was a holdover at the time of the commencement of this proceeding and the petitioner is entitled to a final order awarding the petitioner the possession of the premises.

Order granted.

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Matter of the Estate of HENRY L. EINSTEIN, Deceased.

(Surrogate's Court, New York County, February, 1921.)

**Transfer tax — transfers in contemplation of death — insurance (life) — assignments — Tax Law, § 220.**

Where decedent, three days before he died, and aware that he had but a short time to live, assigned to his son-in-law certain life insurance policies, which in their original form would have been taxable as part of his estate, it will be held that the assignments were "made in contemplation of death"

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within the meaning of section 220 of the Tax Law, and they are subject to a transfer tax on the amount actually received by the beneficiary, discounted as of the date of the assignments.

APPEAL from an order assessing the transfer tax.

Goldsmith, Cohen, Cole & Weiss (Robert E. Samuels, of counsel), for executors.

Lafayette B. Gleason (Schuyler C. Carlton, of counsel), for state comptroller.

COHALAN, S. This appeal is taken by the executor and executrix of the estate of the above-named decedent from the order fixing the transfer tax, on the ground that four policies of life insurance of the face value of $283,257.24 were reported by the appraiser as taxable in that amount. The policies when issued by the company were made payable to the estate of decedent. Three days before he died he assigned them to his son-in-law. He had submitted to three operations for cancer, from which he died on February 28, 1918, at the age of sixty-eight years. He had been under the constant care of a physician and nurse since the first operation was performed in August, 1916, and had been confined to his bed for a month and a half previous to his death. At the time of the execution of the assignments his physical condition, as disclosed by the testimony taken before the transfer tax appraiser, was such that he must have been aware that he had but a short time to live. It is significant that the usual form of changing the beneficiaries in the policies was not followed because of the length of time which the adoption of this course would have involved. The proceeds of the policies in their original form would have been taxable as part of the assets of the estate of decedent. *Matter of Knoedler*, 140 N. Y. 377.

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If no evasion of the imposition of the transfer tax had been intended the decedent could have made the gift to his son-in-law with much less effort and inconvenience by executing a codicil to his will bequeathing the avails of the policies to him. The appellants contend that even conceding the assignments to have been executed by decedent apprehending the near approach of death the proceeds are not taxable. Two classes of transfers during life are declared by section 220 of the Tax Law to be taxable — (1) those which are "made in contemplation of the death of the grantor, vendor or donor," and (2) those which are "intended to take effect in possession or enjoyment at or after such death." The beneficiary designated in an insurance policy when issued or a subsequent assignee acquires an interest at the time of the issuance or assignment which is not a gift "intended to take effect in possession or enjoyment at * * * death." *Matter of Parsons*, 117 App. Div. 321. In the present case, however, the decedent by the assignments to his son-in-law transferred interests or claims of value which, in my opinion, were made "in contemplation of death" and are taxable. The appraiser has fixed the value of the policies at the amount received by the beneficiary. The appellants claim that the surrender value at the date of the assignment is the taxable amount. I do not agree with the latter contention. The surrender value, as provided in the contract of insurance, is the price agreed to be paid by the particular corporation issuing the policy in case it is surrendered by the assured. Such consideration does not establish the market value. The true value was not capable of determination at the date of the assignments. It appears that the assignee and beneficiary actually received the sum of $283,257.24. This sum discounted as of the date of the assignments represents the value

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of the gift transferred. Since, however, the tax on the amount by which the proceeds would be diminished by the discount for three days is so small as to be negligible, the value determined by the appraiser is approved. The order fixing tax will be affirmed.

Order affirmed.

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## Matter of the Probate of the Last Will and Testament of MATILDA E. BURNHAM, Deceased.

(Surrogate's Court, Westchester County, February, 1921.)

**Executors and administrators — contested probate — when executor will not be appointed temporary administrator — incompetent persons — Code Civ. Pro. § 2596.**

Where the son, who is an epileptic, an inmate of a state hospital and the only heir of testatrix, joins in an application of his special guardians for the appointment of a temporary administrator under section 2596 of the Code of Civil Procedure, pending the son's contested probate of the will before a jury, which cannot be tried for some time, the application may be granted as matter of discretion.

Upon the facts and the law applicable thereto it would be an unwise exercise of discretion to appoint one of the executors as such temporary administrator, even though he is a prominent and responsible man of business, and though such a course will cause the payment of an extra commission, a disinterested and suitable person, an attorney and counselor at law, will be appointed such administrator.

APPLICATION by the special guardians of an incompetent person for the appointment of a temporary administrator.

Frederick P. Close and Edward S. Slater, special guardians, for contestant.

Herman A. Schupp (Martin Conboy, of counsel), for proponents.

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SLATER, S. This is an application made by the special guardians of Frederick W. Burnham, the incompetent son and only heir of the testatrix, the incompetent joining in the request, for the appointment of a temporary administrator under section 2596 of the Code of Civil Procedure. A special guardian is more than an attorney. He is a trustee *ad litem*. He must err, if need be, on the side of caution. In bringing on a contest, and attempting to conserve assets, he is answerable to the court, as well as to the incompetent. In the instant case the special guardians have only performed a proper duty. The order in this matter would be intermediate in the proceeding now pending to probate the will. *Matter of Shonts,* 229 N. Y. 374. The application herein is directed to the discretion of the court, the exercise of which is founded upon *any cause* making for delay in the granting of letters, or in probating the will. The estate consists of bonds and mortgages, and other securities, also certain real estate stated to be worth $150,000. Care and control of the real estate and collection of income is required.

A temporary administrator represents the court as conservator to collect and conserve the assets of an estate. He is named with authority to act under the court's direction. *Matter of Hanford,* 113 Misc. Rep. 639; Code Civ. Pro. §§ 2596, 2597.

I have withheld decision for a reasonable time to ascertain if the contest could be tried at the present jury term, and I now ascertain it will not be tried. The next jury term of the court will be held in May and the trial may be prolonged until the autumn. *Matter of Wolfe,* 181 App. Div. 35. Consequently, a temporary administrator should now be placed in charge of the estate to serve as custodian *pendente lite*. Someone with authority should have control of

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the real estate and custody of the securities for their preservation. That delay has occurred and will occur is uncontrovertible. That it may jeopardize the large assets so that those ultimately entitled thereto may suffer loss, is, I think, sufficient cause for granting this application. The allegations of the petition fully justify the granting of temporary administration pursuant to the Code of Civil Procedure. *Matter of Choate,* 105 App. Div. 356.

As to the appointment of a suitable person to serve as temporary administrator. Section 2596 of the Code authorizes the surrogate, in his discretion, to issue to one or more persons letters of testamentary administration. The class of persons from whom the surrogate may make his selection of a temporary administrator is here clearly pointed out. Any one qualified to act as an executor may be appointed by the surrogate in the exercise of his judicial discretion. He is not otherwise limited in his selection. Whether the surrogate should appoint as the temporary administrator one who is named as executor in a disputed will, or some other person, must be decided in each case that presents itself on its own particular facts and circumstances.

It has been my policy to appoint the executors nominated in the will as the custodians of estates, unless there is some peculiar cause or necessity to look elsewhere. In *Matter of Plath,* 56 Hun, 223, Justice Willard Bartlett said: "It is important that the person entrusted with temporary administration should be not only competent and honest, but *disinterested,* and if he had to be either a relative, or a creditor of the deceased, it might often be very difficult to select a temporary administrator who would be indifferent as between the parties to a contest among

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applicants for permanent administration or a contest over the probate of a will."

In the instant case the only heir at law is an incompetent son of the age of about forty-four years. He is an epileptic. The special guardians representing him make no request for the appointment of a particular person as temporary administrator. The proponents, the two executors nominated in the will, Herman A. Schupp, of Westchester county, and Victor H. Thun, of New York county, join in asking for the appointment of Mr. Thun. The contestant has refused to consent; in fact, objects to his appointment. The examination of the witnesses to the will, had preliminary to the filing of the contest, disclosed the fact that Mr. Schupp, one of the executors named, had consulted with the testatrix, and had prepared and attended upon the execution of the will as her attorney. The contestant who alleges lack of testamentary capacity and undue influence, objects to Mr. Thun's appointment, because of his close association with Mr. Schupp in the administration of the estate of William D. Burnham, deceased, the father of the incompetent contestant herein, and for the further reason that he is named as co-executor with Mr. Schupp in the disputed will. The estimated value of the estate of the father, William D. Burnham, exceeds $500,000. The major part of this estate was bequeathed to charity. The father's will bequeathed to the son only such portion of the income upon $15,000 as the trustees thereof, being Mr. Schupp and Mr. Thun, should, in the exercise of their *discretion,* think proper to use for his "comfort, support and maintenance." The corpus of the trust, that is the $15,000, and all unused income passes to the library and reading room of the village of Port Chester, as ultimate legatee. The trustees state that such income is about $900 per

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annum. The incompetent son is, and has been for years, confined in the Hudson River State Hospital, at Poughkeepsie, a state institution. He was placed there by his parents. The trustees of the trust under the father's will are paying for his keep and care $6 per week or about $300 per annum. A like amount is paid by municipalities for the care and keep of their charity and indigent insane in the same and like institutions. This expenditure must be their idea of the proper discretion to be used by them "for the comfort, support and maintenance" of Frederick W. Burnham, for his life, as required by the terms of the trust, because the parents had made similar payments.

Surrogates' Courts have refused to appoint an executor as temporary administrator when it was alleged that such executor was unfriendly, or had assisted in shaping the testamentary disposition of the decedent, or was a party to the litigation; or was, from circumstances, not disinterested. *Jones* v. *Hamersley,* 2 Dem. 286; *Cornwall* v. *Cornwall,* 1 id. 1; *Howard* v. *Dougherty,* 3 Redf. 535; *Matter of Plath, supra.* In *Matter of Wanninger,* 3 N. Y. Supp. 137, Surrogate Ransom refused to appoint an executor a temporary administrator because he was charged with unduly influencing the decedent in making the will. In *Crandall* v. *Shaw,* 2 Redf. 100, it was held to be improper to appoint a person who *was a party to the litigation,* although he was not personally interested in the result, and that none but a disinterested party should be named. This ruling has been followed in *Matter of Stearn,* 9 N. Y. Supp. 445; *Matter of Eddy,* 10 Misc. Rep. 211.

It cannot be truly said that Mr. Thun is disinterested. He is a party to the contest proceeding. He is now acting with Mr. Schupp as one of the executors of and trustees under the will of the father of the

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incompetent contestant herein. The payment of such a meagre sum per week by this trustee and Mr. Schupp, for the "comfort, support and maintenance" of the incompetent, would not lead me to think that they are doing their full duty to the son. A failure to perform a full duty smacks of hostility, lack of interest and lack of a desire to provide all the care that the restricted sum of $900 per annum could buy. As trustees of the $15,000 fund, nor as next friends, they have not proceeded to ask for the appointment of a committee of his person and estate. There is no one to press, if need be, for the use of the whole income of the fund. There is no one to legally ask that he be given more comforts, and better maintenance, and to compel it. There is no one to-day who is providing comforts. It is clear to my mind that it is Mr. Thun's duty to endeavor to carry out the expressed words of the will of Matilda E. Burnham, the mother; therefore, he must necessarily represent interests hostile to the contestant. I do not mean to have this interpreted as hostility of the heart and mind, but legal hostility. The will of the decedent, the mother, leaves nothing to the only child, who suffers from epilepsy. The entire estate passes to nonrelatives and charity. In fact, it appears that of all of the property of both parents, amounting to nearly $1,000,000, only the income of $15,000 is given to the sole heir. The contest for this estate is between legatees, not of the blood of the testatrix, on one side, but strangers — and the natural heir, the incompetent son, the disinherited child of her body, on the other side — a child cursed by heredity for all we know. He is helpless, except as the law gives him the right to go before a jury and assert — a statutory right — the right of inheritance from parents, and attempt to prove that the will should be set aside. The law is silent as to the revo-

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cation of a will when an incompetent and dependent child is disinherited. It permits parents to will property away from an incompetent and helpless offspring. The Decedent Estate Law, sections 26 and 28, rebukes and penalizes parents in certain cases for not providing for the support of their natural offspring. A will made prior to marriage and birth of issue shall be deemed revoked as to issue born thereafter, unless such issue shall be provided for. Such issue is permitted to take their natural inheritance and, if necessary, sue to recover from devisees and legatees therefor.

As I observe, Mr. Thun is in the same position as Mr. Schupp finds himself. They both seek to propound a will that disinherits an only child, who is incompetent. They are both placed in a position of hostility to him. One of them as attorney attended the execution of the paper writing, and both are executors of the father's will. It is fair to assume that they work in harmony and that Mr. Thun as a temporary administrator would be guided and counseled by Mr. Schupp. In fact, Mr. Schupp is the attorney of record for himself and Mr. Thun as such executors in all proceedings relating to the father's estate. Mr. Thun's administration of the estate as temporary administrator pending the contest could not be impartial. He could not well serve two conflicting interests.

To my mind, these facts and circumstances afford sufficient reason why he should not be appointed as temporary administrator against the protest of the contestant. Such temporary collector represents the interests of the legatees, if the will shall be admitted to probate. In a case of rejection, he represents the heir at law. An estate should not be turned over to an expectant contestant to conserve during pending litigation (*Matter of Shonts*, 229 N. Y. 374, 382); nor

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to persons allied, interested, or close to those who are charged with exercising undue influence. *Crandall* v. *Shaw, supra; Matter of Eddy, supra.*

The power of the court to choose as temporary administrator one not "interested" for such an *ad interim* office, "rather than to give to either competitor the advantage of possession of the assets," has been recently upheld in *Matter of Durban,* 175 App. Div. 688; affd., 220 N. Y. 589.

In view of the facts narrated here, as disclosed by the papers, in argument, and upon the law of the cases cited, I am constrained to believe that it would be an unwise and unwarranted use of my judicial discretion to choose Mr. Thun, even though he is a prominent and responsible man in the business world.

It was stated by the proponents in argument that the appointment of one other than Mr. Thun would cause the payment of an extra commission. That is true. If the proponents wish to moralize upon economy, permit me to say that fairness and justice are far greater virtues. It is, in my judgment, better to pay an extra commission than to work a possible hardship upon, and create a disadvantage for a disinherited child, by the court's appointment of one to control assets, who is not disinterested, and who would be in a position hostile to the heir. Why should the proponents be given the advantage, at the outset, of possession of the assets? Justice Putnam, of our Appellate Division, in *Matter of Durban, supra,* has disposed of that question by saying it should not be done. In proponents' desire for economy, they have lost sight of the fact that, in the contest, the incompetent son cannot be awarded counsel fees (*Forster* v. *Kane,* 1 Dem. 67), nor payment for the production of alienists. Contestants are not assisted by the law. The law rather frowns upon attempts to break wills.

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In support of the will, however, which upon its face disinherits the son, the law affords the proponents taxable costs and all necessary disbursements and expenses incurred in the attempt to sustain the will, to be granted in the discretion of the court under section 2746 of the Code of Civil Procedure. Thus, while the incompetent son cannot employ counsel, the executors are permitted to employ learned, eminent, resourceful, and expensive lawyers. Of course, this places the contestant at once at a great disadvantage. The proponents forget the principle of exact justice in their pursuit of economy. Indeed, it might be well for some one to consider whether a next friend, or the state hospital authorities should not petition the Supreme Court to name a committee of the incompetent's person and property, so that such committee might take proper means to have the income upon the trust fund created by the father's will, over and above the six dollars per week now being expended for his care, support and maintenance, used, if possible, to employ counsel to assist the special guardians in the contest. Having in mind the magnitude of the estate, my judgment should not be clouded by false economy from seeing that impartiality is observed in the matter of the control and conservation of the estate, during the period of the contest for its possession.

I will appoint Henry R. Barrett, a disinterested and suitable person, an attorney and counselor at law in Westchester county, as temporary administrator to take possession of all of the assets of the estate, upon his taking the statutory oath of office, and filing a bond equal to the amount of the personal estate.

Decreed accordingly.

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## HERMAN MEHLHOP, Plaintiff, v. CENTRAL UNION TRUST COMPANY OF NEW YORK, Defendant.

(Supreme Court, Bronx Trial Term, February, 1921.)

**Mortgages — recovery of money paid for agreement extending mortgage, which agreement defendant failed to execute — failure of consideration — equity — when findings in foreclosure action not res adjudicata.**

One who had acquired the title to property at the sale on foreclosure of his own mortgage was told that he could have an extension for two years of the first mortgage upon the property, held by defendant and almost due, by a payment of $3,000 on the principal, interest and other charges, and in order to avoid personal liability he transferred the title to plaintiff who alone signed the extension agreement. The $3,000 was paid to defendant by plaintiff from funds furnished by his grantor but no part was ever returned by defendant, and it never executed the extension agreement. In an action to foreclose the first mortgage for its full amount, less the $3,000, the only issue litigated was whether there had been an extension, whether the mortgage was due when the action was begun. That issue was decided in favor of the plaintiff in the foreclosure action and it became the purchaser of the property at the sale. *Held,* that in an action to recover the $3,000, which had been applied by defendant on its mortgage, on the ground that the consideration had failed, the findings in the foreclosure action with reference to the payment of the $3,000 related to matters not litigated, and were not *res adjudicata* in the present action.

The foreclosure action was not commenced until the two years had been nearly completed, and the trial and sale did not take place until after the lapse of such period, and in the meantime the plaintiff herein had carried the property. *Held,* that there was no controlling equity in defendant's favor, which has all it could have had if it had not taken the $3,000, and that plaintiff was entitled to recover such amount which had been paid for something he did not get.

ACTION to recover moneys.

Eugene Cohn (Louis Salant, of counsel), for plaintiff.

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Larkin & Perry (Lewis H. Freedman, of counsel), for defendant.

GAVEGAN, J. This is an action to recover moneys paid to defendant, it being claimed that the consideration has failed. One Haebler, for whom Mehlhop, the plaintiff, is apparently acting, held a mortgage on some lots in The Bronx. In December, 1915, he acquired title to the lots as a result of foreclosing his mortgage. The first mortgage, in amount $30,000, was coming due on January 8, 1916. It was held by defendant. Haebler called on defendant's real estate officer and was told he could have an extension for two years (to January 8, 1918) if he paid off $3,000, reducing the mortgage to $27,000. He was not on the bond, but the mortgage was a lien on the land to which he had acquired title. He was agreeable and the real estate officers of defendant sent him to the defendant's lawyers, whose representative made a memorandum of the principal terms and, later on, prepared and mailed to Haebler an extension agreement as arranged. Haebler never signed it, but, evidently for the purpose of avoiding personal liability, transferred title to this plaintiff. Their lawyer substituted plaintiff's name and address for Haebler's and had plaintiff execute the extension. The necessary funds having been provided by Haebler, the lawyer delivered to the representative of the trust company the extension, signed by plaintiff, at the same time paying the $3,000 on the principal of the mortgage, the interest due on that day, January 8, 1916, the amount of the disbursements which the trust company would have to make for revenue stamps and the fee of the lawyers for drawing the extension.

No part of those moneys seems ever to have been returned by the trust company and it never executed



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the extension. When it was discovered that plaintiff and not Haebler had executed the extension defendant's lawyers wrote a letter demanding that Haebler execute it.

Subsequent developments are not very clear, until some time in November, 1917 (less than two months before January 8, 1918) when the trust company began to foreclose. Mehlhop, a defendant in the foreclosure action, plaintiff here, alone answered. His answer is verified January 24, 1918. He pleaded that the mortgage had been extended, that it was not due when the action to foreclose began. The case was tried in March, 1918. Inasmuch as the trust company had never executed or delivered the extension, that issue was decided for the trust company. The property was sold under the foreclosure and was bought in by the trust company.

Thereafter this action was begun to recover the $3,000. It had been applied by defendant on the principal of the mortgage and it foreclosed for $30,000 less the $3,000, for $27,000.

(1) Defendant relies on the findings in the foreclosure action relating to the payment of $3,000 as on account of the principal of the mortgage. In that action the question litigated was whether there had been an extension, whether the mortgage was due when the action was begun. The defendant owner did not take the position that the amount was less than the mortgagee claimed. And there was no issue as to the amount claimed. The findings which relate to the $3,000 payment, its purpose and character, are not the outcome of the determination of the issues in the action. They relate to matters not there litigated and are not binding between the parties. The defense of *res adjudicata* failed in this action.

(2) As to the argument based upon the assertion

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that a parol extension resulted from the arrangements made with Haebler: Passing by the fact that the mortgagee, this defendant, successfully contended in the foreclosure action that the mortgage had not been extended, the testimony as to what happened when Haebler called shows that a parol contract of extension had not been made. The representative of the mortgagee, as well as Haebler, did not regard those negotiations as a contract but they contemplated the subsequent execution of a contract in writing. Apparently they did not go into details as to the clauses to be contained in it. There is no testimony warranting a conclusion that Haebler knew or was informed that it would read to make him personally liable on the debt. It is probable that his discovery of that clause led him to substitute plaintiff in his stead. Furthermore, such parol contracts of extension are unusual. It is usual to regard the matter as not being closed until the execution and delivery of the written agreement.

(3) The equities are not with the mortgagee though the foreclosure was not commenced until the two years had been nearly completed and the trial and sale did not occur until after such period had elapsed. The plaintiff had carried the property. The mortgagee, which has the property and the bond, lost nothing by waiting. It gained by the amount of carrying charges paid by plaintiff. While plaintiff paid the same it waited, its representatives probably hoping that plaintiff's chance of getting back the $3,000 would grow dim with time. He had not received what had been bargained for but was in no position to immediately sue to recover the money paid; for the mortgagee had the whip hand. His safety was dependent upon the good will of the mortgagee. He could safely do nothing but wait so long as the Statute of Limita-

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tions permitted. Recovery for failure of consideration implies unjust enrichment to the defendant. Where time has not worked equities clearly against the plaintiff lapse of time is material only in considering whether the Statute of Limitations has expired.

There being no controlling equity in defendant's favor plaintiff is entitled to recover the $3,000, as he was at the moment he paid for something he did not get. While the $3,000 was intended to be applied to reduce the mortgage, it was to be paid only if the mortgage was extended. On no other condition did the defendant have the right to accept it in reduction of the mortgage. At that time and at all subsequent times the mortgagee acted voluntarily. It held the $3,000 and had the right to foreclose. But it did not change the equities by holding the money and waiting its best interest as well as its convenience. And it lost nothing by waiting. It has the property and the bond, or a deficiency judgment, all it could have had if it had not taken the $3,000.

Verdict will be directed for the plaintiff.

Judgment for plaintiff.

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LUCILLE G. ISAACS, Plaintiff, *v.* THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Defendant.

(Supreme Court, Richmond Trial Term, February, 1921.)

**Insurance (life) — when company bound by delivery of policy to assured although conditions of policy are not complied with — actions — evidence — contracts.**

The common practice of insurance companies placing in the hands of agents policies which appear on their face to be binding contracts of insurance, but which are intended to be effective only on compliance with certain preliminary conditions, is not to be commended, and if the agent deliver the policy

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without requiring compliance with such conditions, the insurance company is in justice bound by the policy.

Where in an action to recover on a policy of insurance issued by defendant on the life of plaintiff's husband within a month of his death, the evidence is that the delivery of the policy by defendant's soliciting agent to the insured, who never signed the application for the policy, and his acceptance thereof, were with intent that it should at once become a contract and the first premium paid later, and it further appears that the attention of the insured, though he had previously taken out other insurance with defendant, was not called to any provision of the policy requiring the signing of an application, or the payment of the first premium, or any other preliminaries, and that the agent had apparent authority to deliver the policy, it became a contract binding upon both parties, and as against the defense that the policy had no valid inception, plaintiff was entitled to recover the amount of the policy less the amount of the first premium, with interest from the date when the proceeds became due and payable.

ACTION to recover the proceeds of a policy of life insurance.

Carl D. Isaacs (Montague Lessler, of counsel), for plaintiff.

Alexander & Green (Clifton P. Williamson and Peter C. Mann, of counsel), for defendant.

BENEDICT, J. This is an action to recover the proceeds of a policy of insurance on the life of Max M. Isaacs, deceased husband of the plaintiff. The defendant resists payment on the ground that the policy never had a valid inception, because the application was never signed by the assured, and because the first premium was not paid at the time of the assured's death.

Briefly stated the facts were that one Graham, a soliciting agent of defendant, had in December, 1919, obtained from the assured an application for a $3,000

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policy, which was issued and delivered and the first premium paid. Graham had also caused to be issued a $2,000 policy, which he offered to assured at the same time, and which assured accepted, signing the application therefor and paying the first premium. Subsequently, on January 18, 1920, without further order or application by the assured, Graham caused to be issued by the defendant an additional policy on the life of the assured for $3,000, based upon the examination made upon the first application above mentioned, which policy Graham offered to the assured on January 17, 1920. Just what took place at the time of this offer is in dispute. A disinterested witness, called on behalf of plaintiff, gave testimony which would justify the inference that assured accepted this additional policy, and that it was agreed between him and Graham that he should pay the first premium at a later date. Graham, on the other hand, gave testimony to the effect that he left the policy with assured pending the latter's decision as to whether or not he would accept it. There is no dispute that the policy was handed to and left with assured, together with an application to be signed by him, a copy of which was attached to the policy. Very shortly afterward assured became ill and died of such illness early in February, 1920. The application for the policy was never signed and the first premium never paid. The form of application contained the following provision: "I hereby agree that the policy issued hereon shall not take effect until the first premium has been paid during my good health; that no agent or other person except the President, a Vice-President, the Secretary or Treasurer of the Society [the defendant] has power to make or modify any contract on behalf of the Society or to waive any of the Society's rights or requirements, and that no waiver

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shall be valid unless in writing and signed by one of the foregoing officers."

The policy itself contains the following clauses, which are material to the present inqury:

"THE CONTRACT. This policy, and the application therefor, a copy of which is endorsed hereon or attached hereto, constitute the entire contract between the parties."

"AGENTS are not authorized to modify, or in the event of lapse, to reinstate this policy, or to extend the time for payment of any premium or instalment thereof."

"This insurance is granted in consideration of the payment in advance of Thirty-five and 28/100 Dollars and of the payment quarterly thereafter of a like sum," etc.

"GRACE. A grace of thirty-one days, subject to an interest charge at the rate of 5% per annum will be granted for the payment of every premium *after the first*, during which period the insurance hereunder shall continue in force." Italics are mine.

These several provisions appear on the inside of the policy on pages 2 and 3.

At the conclusion of the trial both parties moved for the direction of a verdict, thus submitting all questions both of law and fact to the court for decision. Decision of these motions was reserved by consent of counsel for both parties.

I have reached the conclusion that a verdict should be directed for the plaintiff for the amount of the policy, less the first premium, and interest from the date when the same became due and payable.

So far as the issue of fact above outlined is concerned, the weight of evidence seems to me to be in favor of the plaintiff. Plaintiff's witness was disinterested, while defendant's witness, who is still in its

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employ, and who may be affected financially by the result of this action if he disobeyed his instructions, cannot be regarded as being disinterested. I, therefore, decide that the policy was delivered by Graham and accepted by assured with intent that it should take effect at once, and that the payment of the first premium should be deferred for a short time.

This brings me to the next question, whether such action on the part of Graham was effective to give a valid inception to the policy in the face of the provisions contained therein and in the application, which I have above quoted. If there had been evidence that the attention of assured had been in any way called to the said provisions, or to the necessity of signing the application and paying the first premium before the policy would take effect, I should say without hesitation that the policy never had any inception as a contract. But such was not the case. The policy and the application appear to have been handed to assured in an envelope. Part of the envelope was transparent, so that the number and amount of the policy and the name of the assured, amount of premium and other matters indorsed on the outside of the policy were visible, and there was printing on the back of the envelope. There was nothing, however, visible on the outside to call assured's attention to the clauses and provisions above quoted, and there was no evidence that his attention was called thereto in any other way. That assured had previously taken out other insurance with defendant, and so may have acquired knowledge of the provisions contained in other policies and applications does not, as it seems to me, affect the question. It was what was done with respect to this particular transaction, and only that, which is material in determining the rights of the parties. *Bodine* v. *Exchange Fire Ins. Co.*, 51 N. Y. 117, 122.

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As the defendant intrusted this fully executed policy to Graham for delivery, I think he must be considered as clothed at least with apparent authority to deliver it upon the terms and under the conditions upon and under which I have found, as above stated, that he did deliver it; and, as assured's attention was not called to the provisions limiting Graham's authority, the defendant is bound by the policy.

This seems to me to be the result of the leading authorities on this subject. In the latest pronouncement by our Court of Appeals, to which my attention has been called, *Whipple* v. *Prudential Ins. Co.*, 222 N. Y. 39, Collin, J., writing for an unanimous court, said: "We are, therefore, to determine whether or not there was any evidence that the defendant waived its right that the policy should remain ineffective until the payment of the first premium. Our conclusion depends upon the existence or non-existence of evidence tending to prove (a) that J. W. Wilson, who delivered the policy, had authority to waive that right, and (b) that his acts and language effected the waiver." Pp. 44, 45.

In the present case the first condition is met, as already indicated, by the fact that the defendant by intrusting the executed policy to Graham clothed him with apparent authority to make the waiver (*McClelland* v. *Mutual Life Ins. Co.*, 217 N. Y. 336, 346 *et seq.*; *Ames* v. *Manhattan Life Ins. Co.*, 40 App. Div. 465; affd., on opinion below, 167 N. Y. 584; *Bodine* v. *Exchange Fire Ins. Co.*, 51 id. 117, 123), assured not being affected with notice of any limitation upon such authority, as I have pointed out. The present case is distinguishable from *Allen* v. *German American Insurance Co.*, 123 N. Y. 6, by the fact that there the person to whom the policy was intrusted for delivery was a mere broker not in defendant's general employment. See *Bernard* v. *United Life Ins. Assn.*, 17 Misc.

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Rep. 115. The second condition is met by plaintiff's proof of the interview between Graham and the assured at the time of the delivery of the policy above referred to. The present case is distinguishable from *Russell* v. *Prudential Insurance Co.*, 176 N. Y. 178, by the fact that in that case assured had signed the application and hence must in the absence of proof to the contrary be presumed to be familiar with the contents thereof. P. 188. In the present case the policy if it became a contract at all, became so at the moment of delivery. There being evidence that the delivery and acceptance were with intent that it should at that time become a contract, and the attention of assured not having been then called to any provision therein requiring the signing of an application or the payment of the premium or any other preliminaries, and Graham having apparent authority to make delivery, the contract thereupon became binding on both parties. The stipulations intended to prevent the policy from becoming effective until the signing of the application and payment of the first premium could not themselves become effective until the policy became a contract, and they could be waived by delivery and acceptance of the policy with intent that it should take effect without compliance therewith. *Whipple* v. *Prudential Ins. Co., supra,* 43; *Bodine* v. *Exchange Fire Ins. Co.*, 51 N. Y. 117.

The common practice of insurance companies of placing in the hands of agents policies which appear on their face to be binding contracts of insurance, but which are intended to be effective only on compliance with certain preliminary conditions, is not one to be commended, and if, in such a case, the agent deliver the policy without requiring compliance with such conditions, the insurance company ought in justice to be bound by the policy. *Church* v. *LaFayette Fire Ins.*

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*Co.*, 66 N. Y. 222; *Squier* v. *Hanover Fire Ins. Co.*, 18 App. Div. 575, 578.

A verdict is accordingly directed for the plaintiff for the amount of the policy less the amount of the first premium, and interest from the date when the proceeds became due and payable.

Judgment accordingly.

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ELLA M. STURGES, Plaintiff, *v.* WILLIAM A. STURGES, Defendant.

(Supreme Court, Monroe Special Term, February, 1921.)

**Arrest — when motion to vacate an order of, denied — undertakings — bail — Code Civ. Pro. §§ 550, 575.**

An undertaking on arrest given under sections 550 and 575 of the Code of Civil Procedure by the defendant in an action for separation, is in the nature of equitable bail to insure the payment of alimony as provided in the final decree, and defendant's motion to vacate the order of arrest and to discharge the undertaking on the ground that the case has been tried and a decree entered will be denied.

MOTION to vacate order of arrest.

McInerney & Bechtold, for motion.

H. H. Cohen, opposed.

RODENBECK, J. The defendant was arrested under section 550 of the Code of Civil Procedure during the pendency of an action for separation and gave an undertaking to be released from arrest. He now moves to vacate the order of arrest and discharge the undertaking on the ground that the trial has been had and a decree of the court made. The undertaking in this action was given under sections 550 and 575 of

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the Code to insure the observance of the decree in this action. Section 550 is a substitute for the old writ of ne exeat which cannot be definitely traced to its source (Story Eq. Juris. 1464 *et seq.;* 11 Kent Com. 31; Beames Ne Exeat Regno) and is interesting only in this state as illustrating the cases in which it was resorted to and the tenacity with which a learned profession clings to ancient procedure. The writ was not abolished until 1876 when the first part of the Code of Civil Procedure was adopted (§ 548). There are other writs in the Code of Civil Procedure just as antique in their procedure as the writ of ne exeat and yet they are continued from year to year and survive in the proposed revision of the Code of Civil Procedure with only a change in name to plague the practice of the law. Relief under section 550 like that under the old writ of ne exeat is in the nature of equitable bail. The purpose of it is to insure the presence of the party in the state to answer the decree of the court. Under the common law a subject could leave the domain at will and the writ of ne exeat was created first as a prerogative writ to restrain him within the realm to aid the state in time of need and later it was applied by the Court of Chancery to equitable cases. When the writ was in existence it was available in actions for divorce and separation (*Denton* v. *Denton,* 1 Johns. Ch. 365, 441; *Boucicault* v. *Boucicault,* 21 Hun, 431; *Bushnell* v. *Bushnell,* 15 Barb. 399; 29 Cyc. 387; Story Eq. Juris. §§ 1472, 1473) and under section 550 it may be properly resorted to in the same kind of actions. *Gardiner* v. *Gardiner,* 3 Abb. N. C. 1. The object is to furnish a complete remedy to enforce the decree which the court otherwise would be powerless to do and to prevent the decree from being defeated by fraud. *People* v. *Tweed,* 5 Hun, 382, 389; Story Eq. Juris. § 1472. The undertaking in this case provides that the

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defendant will obey the direction of the court or of an appellate court contained in an order or a judgment requiring him to perform the acts specified in the order; or, in default of his so doing, that he will at all times render himself amenable to proceedings to punish him for the omission. Code Civ. Pro. § 575, subd. 1. On its face and in accordance with the practice, the undertaking is in the nature of equitable bail to insure the payment of the alimony provided in the decree and cannot be discharged as claimed on this motion after the decree has been granted because given while the action was pending. The motion is denied, with ten dollars costs.

Motion denied, with ten dollars costs.

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JOHN M. PFAUDLER, Plaintiff, *v.* THE PFAUDLER COMPANY, Defendant.

(Supreme Court, Monroe Special Term, February, 1921.)

**Pleading — when complaint demurrable — corporations — use of surname — Civil Rights Law, §§ 50, 51.**

In the absence of equitable considerations, a complaint against a corporation that its use of plaintiff's surname for advertising or trade purposes constitutes a violation of the statute (Civil Rights Law, §§ 50, 51), which prohibits such use, is demurrable on the ground that under the statute alone, the plaintiff is not entitled to an injunction or damages for such alleged use of his surname.

MOTION for judgment on demurrer.

McGuire & Wood (J. Sawyer Fitch, of counsel), for demurrer.

McInerney & Bechtold, opposed.

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RODENBECK, J. The cause of action alleged in the complaint rests upon the question whether or not the use of the plaintiff's surname by the defendant constitutes a violation of the Civil Rights Law (§§ 50, 51) which prohibits a corporation from using the name of a person for advertising purposes or for purposes of trade. There are no equitable considerations stated in the complaint. There is no charge of unfair competition or that the plaintiff has been specially injured in his character, reputation or property. It is alleged that the plaintiff gave the defendant permission to use the name "Pfaudler" in connection with the words "Vacuum Fermentation Company" for a period of twenty-five years but this language is not to be construed as equivalent to an allegation that a contract existed between the parties under which the defendant agreed not to use the word "Pfaudler" in connection with any corporation. Nor is there any charge of fraud. The sole question is whether or not the Civil Rights Law prohibits the defendant from using the plaintiff's surname. The word "name" as used in the statute must mean a person's full name. It was evidently the purpose of the legislature to prevent the use of the full name of a person by which alone he could be identified. This identification is possible in the case of the use of a portrait or picture, the use of which the statute also prohibits. It is not possible where only the surname of a person is employed. The word "Pfaudler" does not identify the plaintiff as the person whose surname has been used except to those persons who may know the origin of the company and even then it is impossible to say whether the word refers to the plaintiff or to his brother Casper, both of whom were at one time connected with the defendant's predecessor. No cause of action is stated under the Civil Rights Law and none existed at common law

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under the facts alleged in the complaint. *Roberson* v. *Rochester Folding Box Co.*, 171 N. Y. 538. The history of the origin of surnames illustrates why such an action would not lie at common law. Surnames did not have the permanence and importance in ancient times that they have today. Sons commonly adopted or were given a surname differing from that of the father and arising from some peculiarity of mind or body or place of abode. It was not until registration of names was required for purposes of birth, marriage and death that the surname became the established part of the name and the given name varied for purposes of identification until now both names and sometimes a middle name is necessary to identify persons having the same surname. *Matter of Snook*, 2 Hilt. 566; *Smith* v. *U. S. Casualty Co.*, 197 N. Y. 420. An action at common law may have existed for the use of a person's name, picture or portrait under certain circumstances involving an injury to the character, reputation or property of the person but not under the circumstances alleged in the complaint. If this were not the rule, common surnames like Smith, Jones or Brown could not be used without entailing claims for damages on the part of every person having these names. There is no legal objection to any person assuming the name "Pfaudler" (*Olin* v. *Bate*, 98 Ill. 53; *Smith* v. *U. S. Casualty Co.*, *supra*, 428) and there should be none on the part of a corporation in the absence of actionable equitable considerations. The plaintiff is not barred from using his name in connection with that of a corporation provided the use does not involve unfair competition. *Higgins Co.* v. *Higgins Soap Co.*, 144 N. Y. 462, 468; *Cutter* v. *Gudebrod Bros. Co.*, 36 App. Div. 362; *Burrow* v. *Marceau*, 124 id. 665, 669; *Burgess* v. *Burgess*, 3 De Gex, M. & G. 896. The plaintiff has no such exclusive right to the

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use of the surname "Pfaudler" as to bar others from using it under circumstances that do not involve a legal or equitable injury. 23 Cyc. 271. Having permitted the corporation to use the surname for a period of twenty-five years, he cannot now prevent its use by the corporation as a going concern. *Cutter* v. *Gudebrod Bros. Co.*, 44 App. Div. 605; affd., 168 N. Y. 512. In the absence of equitable considerations therefore the plaintiff is not entitled under the statute alone to an injunction or to damages against the defendant for the use of the word "Pfaudler," and the demurrer should be sustained, with leave to the plaintiff to amend within twenty days after the service of a copy of an order in accordance herewith and the payment of costs.

Ordered accordingly.

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LESLIE G. LOOMIS and LESLIE G. LOOMIS, JR., Plaintiffs, *v.* LEHIGH VALLEY RAILROAD COMPANY, Defendant.

(Supreme Court, Ontario Special Term, February, 1921.)

**Pleading — when defendant not entitled to an order to compel plaintiff to amend complaint — carriers — actions.**

Where a complaint, as a second cause of action, alleges that plaintiffs tendered to the defendant certain shipments of merchandise for transportation to various points upon its own and connecting lines; that defendant supplied for such shipment ordinary box cars, but that plaintiffs, in order to load the cars, either to mimimum or maximum capacity, were compelled to equip them with inside or grain doors or bulkheads, at an expense of a specified sum, defendant is not entitled to an order requiring plaintiffs to amend the complaint by separately stating and numbering the causes of action contained in the second cause of action, and defendant's motion for such an order will be denied.

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MOTION on behalf of the defendant in the action above entitled for an order requiring the plaintiffs to amend the complaint by separately stating and numbering the causes of action contained in the second cause of action alleged therein.

Myron D. Short, for plaintiffs.

Hubbell, Taylor, Goodwin & Moser (Frank E. Devans), for defendant.

STEPHENS, J. The plaintiffs allege for their second cause of action, in brief, that they tendered to the defendant certain shipments of grain, produce, vegetables and fruits in car lots for transportation to various points upon its own and connecting lines; that defendant supplied for such shipments ordinary box cars, and that they were compelled, in order to load the cars either to minimum or maximum capacity, to equip said cars with inside or grain doors or bulkheads at an expense of eighty-seven dollars and sixty-eight cents.

It does not appear from the complaint, strictly speaking, that there is more than one cause of action involved in the second cause of action alleged although it may be easily inferred; but for the present purpose it will be assumed that there are, as stated, in defendant's brief about one hundred and seventy different instances in this and a companion action of alleged failure by the defendant to furnish suitable cars to the plaintiffs and that these repeated failures furnish the basis for the plaintiffs' total demand, in the two actions.

I am unable to approve the defendant's position, so earnestly presented by counsel, that each failure on the part of the defendant to provide a car adequately



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equipped for its particular purpose constitutes a separate cause of action so that the plaintiffs must split their aggregate claim into its multitude of component fragments.

It is immaterial whether the duty of the defendant to furnish suitable cars has a common law or statutory origin (*Loomis* v. *Lehigh Valley R. R. Co.*, 208 N. Y. 312; 240 U. S. 43); the obligation in either event had a common source; the relation between the plaintiffs and the defendant in each individual shipment was identical, that of shippers on the one part and carrier upon the other; each alleged failure by the defendant in its duty is essentially the same and like means were taken by the plaintiffs on each occasion to render the cars serviceable and the same legal remedy is available to the plaintiffs in each case for their reimbursement; the variant elements relate to the destination of the shipment, character and weight of it, the number, height and location of the bin doors supplied by the plaintiffs and perhaps other factors mentioned in the freight tariffs that enter into the problem of the amount to be allowed by a carrier to a shipper for such services as the plaintiffs may establish that they have performed.

In *Loomis* v. *Lehigh Valley R. R. Co., supra,* the complaint was substantially the same as here and while the Court of Appeals stated that there were two causes of action alleged in the complaint, one for the items disbursed in intrastate shipments and one for those in interstate shipments, there was no suggestion that each item in either class of shipments constituted a separate cause of action; it is probable, however, that no ruling in this respect was requested or made.

The conclusion that I have reached is that the defendant is not entitled to have the separate items

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of plaintiffs' claim stated and numbered as separate causes of action; both as a legal and as a practical proposition it is no differently situated than if it was defending plaintiffs' first cause of action only which alleges as the ground of recovery the value of lumber furnished at different times at the request of the defendant; as above indicated the items that measure the extent of defendant's liability under the second cause of action have a common origin no less than if they were of contractual origin.

This result is in harmony with that in *Langdon* v. *New York, L. E. & W. R. Co.*, 15 N. Y. Supp. 255, where a similar motion in a situation quite like the one presented here was denied. The motion is denied.

Motion denied.

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WALTER C. BUTLER, Plaintiff, *v.* EDWARD H. SHERWOOD, Individually and as Administrator, etc., of ELLA F. SHERWOOD, Deceased, Defendant.

(Supreme Court, Cortland Trial Term, February, 1921.)

**Deeds — when plaintiff entitled to judgment declaring the instrument null and void — actions — Statute of Wills — gifts.**

By a writing in the form of and acknowledged as a deed, the grantor quit-claimed to her husband, to whom the instrument was delivered on the day of its date, all real estate of which she should die seized, and also assigned to him all of her personal property. By the instrument, she reserved full control and dominion over her property, and it was left entirely discretionary with her whether at her death anything should be left to her grantee. *Held,* that in an action by the brother and only next of kin of the grantor, to have the instrument annulled on the ground that it was an attempt by the grantor to dispose of her property in a form and manner con-

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trary to the Statute of Wills, plaintiff was entitled to a judgment declaring the instrument null and void.

The instrument, in the circumstances disclosed, can be sustained neither as a gift *inter vivos* nor as a gift *causa mortis*.

ACTION to nullify an instrument in the form of a deed.

Levi R. Chase, for plaintiff.

Willard A. Rill, for defendant.

TUTHILL, J. The plaintiff, a brother of Ella F. Sherwood, deceased, and her only heir at law and next of kin, brings this action to nullify an instrument made by Mrs. Sherwood to her husband, the defendant Edward H. Sherwood, January 25, 1916. The instrument is in the form of a deed, acknowledged and witnessed, and recites that the same is in consideration of one dollar, love and affection, and other good and valuable considerations, and remises, releases and forever quitclaims to her husband, the defendant, all her real estate wheresoever situate in the United States of America, of which she shall die seized, and also assigns to him all of her personal property of whatever name or kind the same may be and wheresoever situate. Continuing, the instrument provides: "This conveyance and transfer are made upon the condition that the party of the second part, my husband, survive me and the same is intended to vest and take effect only upon my decease, and until said time, the same shall be subject to revocation upon the part of the party of the first part." It also provides that the second party shall pay five dollars a week to the stepfather of Mrs. Sherwood during his lifetime if he survives her. His death, however, occurred before Mrs. Sherwood's, she having died January 6, 1920.

The plaintiff assails the instrument and asserts that

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it was an attempt by the decedent to dispose of her property in a form and manner contrary to the Statute of Wills, and is, therefore, void. The evidence shows that the decedent was a woman of strong mind and determination and adverse to making a will, having been a party to a contest under a will of her former husband; that at the time she executed the instrument in dispute, she was suffering from cancer and immediately thereafter submitted to an operation receiving relief therefrom, but died of the same disease about four years later.

The plaintiff also disputes the delivery of the instrument, but I am satisfied from the evidence that it was delivered by Mrs. Sherwood to her husband immediately after it was executed and on the day it bears date.

The evidence also shows, otherwise than by the document itself, that the decedent intended her husband at her death should be the sole recipient of her bounty to the exclusion of her kin. The question is, whether she has legally accomplished her purpose. The way was simple but it was not Mrs. Sherwood's way. She proposed to contravene the conventional manner of testamentary disposition and effectuate her purpose by deed. That a person may ordinarily do as they wish with their own is conceded, but the manner of accomplishing the same is subject to limitations.

A careful reading of the clause quoted above is convincing that the grantor did not intend to convey any present estate, title or possession to the grantee. Under the instrument it was left entirely discretionary with her whether at her death anything should be received by the grantee. She reserved full control and dominion over her property. She used most apt language to retain the title and possession as she said

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"the same is intended to vest and take effect only upon my decease, and until said time, the same shall be subject to revocation." She withheld the vesting which gives a fixed and indefeasible right to property; also she withheld possession as she gave no absolute present or future right of enjoyment. An estate is vested in possession when there exists a right of present enjoyment; and is vested in interest when there is a present fixed right of future enjoyment. Under the instrument the grantee was given neither. He was given nothing which he could enforce as against the grantor nor those claiming under her. She could have conveyed or transferred any or all of her real or personal property and given good title as nothing had vested in the grantee or passed to him under the instrument. He had not even a prospective interest legal or equitable, present or future, in any of the property which was not extinguishable by the grantor. In legal effect the instrument made no change in title during Mrs. Sherwood's lifetime. The property remained hers for all purposes until she died. The instrument by its terms was ambulatory and conferred no present rights and was to take effect on the grantor's death, but was shorn of the requisite formalities to make it a testamentary disposition. The effect of such an instrument is well expressed by the court in *Turner* v. *Scott,* 51 Penn. St. 126, 134: "The doctrine of the cases is, that whatever the form of the instrument, if it vest no present interest but only appoints what is to be done after the death of the maker, it is a testamentary instrument. It signifies nothing that the parties meant to make a deed instead of a will." See, also, *Boon* v. *Castle,* 61 Misc. Rep. 474; *Evans* v. *Evans,* 69 id. 86; *Leonard* v. *Leonard,* 145 Mich. 563; *Leaver* v. *Gauss,* 62 Iowa, 314; *Aldridge*

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v. *Aldridge,* 202 Mo. 565; *Wilson* v. *Wilson,* 158 Ill. 567.

The defendant contends that the instrument may be considered a gift. Certainly it cannot be sustained as a gift *inter vivos* as the alleged donor did not divest herself of the property and the donee acquired no legal title to it. It did not take effect immediately and irrevocably during the donor's lifetime. It was not executed and it required a further condition, the death of the donor, to make it complete, as the instrument expressly stipulated that it should not take effect until the grantor's death. 20 Cyc. 1192. Neither do I believe the instrument can be sustained as a gift *causa mortis.* It cannot as to the decedent's real estate for the decided weight of authority is that "Real estate, in the very nature of things, cannot be the subject of gift *causa mortis.* That species of gift is confined strictly to personal property." 20 Cyc. 1242, and cases cited in note 56; Thorn. Gifts & Adv. 373, § 370; 3 Pom. Eq. Juris. (4th ed.) 2626, § 1148; *Irish* v. *Nutting,* 47 Barb. 370, 385.

As to the personal property I do not believe the instrument can be construed as a gift *causa mortis.* In either form of gift the donor must surrender the possession and dominion of the property to the donee. *Ridden* v. *Thrall,* 125 N. Y. 572, 579. This, as has been observed, was not done. The donee was to remain in control until her death, as there was no vesting or taking effect until the happening of that event. Also in gifts *causa mortis* more is needed. "The gift must be made under the apprehension of death from some present disease or some other impending peril, and it becomes void by recovery from the disease or escape from the peril. It is also revocable at any time by the donor, and becomes void by the death of the donee in the lifetime of the donor. It is not needful that the

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gift may be made *in extremis* when there is no time or opportunity to make a will. In many of the reported cases the gift was made weeks, and even months, before the death of the donor when there was abundant time and opportunity for him to have made a will." Earl, J., in *Ridden* v. *Thrall, supra,* 579.

Diligent search of counsel has failed to find an authority where several years have elapsed between the making of a gift and the death of the donor. While there is no prescribed time which must intervene, the longest time as shown in any case cited where the gift was held valid is a period of five months (*Grymes* v. *Hone,* 49 N. Y. 17), the court saying (p. 20): "But at this time it is generally agreed that, to constitute such a gift, it must be made with a view to the donor's death from present illness or from external and apprehended peril. It is not necessary that the donor should be *in extremis,* but he should die of that ailment. If he recover from the illness or survive the peril, the gift thereby becomes void; and until death it is subject to his personal revocation. (2 Kent, 444, and cases cited; 2 Redfield on Wills, 299 *et seq.;* 1 Story Eq. sec. 606, etc., notes and authorities.)" Also in *Williams* v. *Guile,* 117 N. Y. 343, the court held, as expressed in the head note: "it is sufficient if it appears the gift was made during the existence of a bodily disease, or illness which imperiled the donor's life, and when he must be deemed to have had his death in view, and that death occurred from the disorder or illness." In that case the donor died about six weeks after making the gift.

In the present case Mrs. Sherwood, shortly previous to making the instrument, was advised to submit to an operation and no doubt knew the nature of her malady and executed the deed contemplating she might not recover from the operation. This plainly appears from

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the evidence of one of defendant's witnesses who stated that before Mrs. Sherwood went to the hospital in Binghamton "she said she was waiting for some papers to come back to sign before she went, because if anything happened to her she wanted things fixed so if she didn't come back everything would be as she wanted it." She did, however, return from the hospital much improved and there was no recurrence of the disease for about two and a half years. During this period Mrs. Sherwood was about town, transacted business affairs and went on long automobile journeys, and otherwise indicated she was in a fairly normal condition. In June, 1919, she had a second operation and died from the ailment in January following. Under the circumstances I believe it should be held that there was such a recovery from the illness and the impending peril of the first operation as to defeat the gift which, if made, was approximately four years before the donor's death. The situation is not entirely unlike that often referred to as a soldier's gift made when he enlists upon condition that if he never returns from the war it should become absolute, which has been held invalid as a *donatio mortis causa.* In *Irish* v. *Nutting,* 47 Barb. 370, 387, the court says: "In short, a vague and general impression that death may occur from these casualties which attend all human affairs, but which are still too remote and uncertain to be regarded as objects of present contemplation and apprehended danger, is not sufficient to sustain such a gift as the one which is claimed in this case. The party must be in a condition to fear approaching death from a proximate and impending peril, or from illness preceding expected dissolution." See, also, *Sheldon* v. *Button,* 5 Hun, 110; *Dexheimer* v. *Gautier,* 34 How. Pr. 471; *Gourley* v. *Linsenbigler,* 51 Penn. St. 345. Professor Pomeroy in commenting upon these

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decisions says, in his opinion, they are clearly correct. "If such gifts were valid as donations *causa mortis*, on the same ground gifts made at any time by persons having a chronic disease, although in no immediate danger would be equally good because their lives are more likely to be shortened than those of persons in health." 3 Pom. Eq. Juris. (4th ed.) 2653, 2654. The same author says (p. 2650): "A donation *causa mortis* is a gift absolute in form, made by the donor in anticipation of his speedy death, * * *." Thornton on Gifts and Advancements (pp. 41, 42), speaking of the effect of a recovery from illness, says: "The question is one that necessarily arises, what is a recovery; or what is such a recovery as will defeat the gift? This is difficult to answer for there is no light upon the subject. A man who is in imminent peril because of sickness or disorder that possesses him is usually confined to his bed; and if he so far recovers as to leave his room and his house, and to attend to some of his daily affairs, it cannot be said that the gift is unrevoked. A man with a chronic disease may be afflicted for years with his disorder, and may well know and consider that he never will recover; and yet a gift made while he is going about his usual and daily occupations could not be considered as made during his last illness, although he might die within the next twenty-four hours. A man having the heart disease severely is usually in imminent peril of death, and still performs all the avocations of a well man; yet a gift made by him as a *donatio mortis causa* would not be valid though he were stricken and die within the next three minutes, unless, at the time of the gift, he had clear premonition of his approaching death."

It would not seem, therefore, a gift *causa mortis* is sustainable where the donor dies from a disease which may be lingering for years and from which

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there is or may be from time to time a substantial recovery. "A vague and general apprehension of death from the mortality of man will not suffice, there must be an apprehension arising from some particular sickness, peril or danger." 20 Cyc. 1236.

From the foregoing it follows that judgment should be directed declaring null and void the instrument executed by the decedent on January 25, 1916, with costs against the defendant individually.

Judgment accordingly.

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JENNIE SHERLOCK, Claimant, *v.* STATE OF NEW YORK.

Claim No. B-22.

(State of New York, Court of Claims, February, 1921.)

**Court of Claims — jurisdiction — banks — claims — state — Statute of Limitations — Laws of 1919, chap. 581.**

The statute (Laws of 1919, chap. 581) conferring jurisdiction upon the Court of Claims to hear, audit and determine the claims of the depositors and creditors of two certain banks against the state, for damages sustained through the failure of said banks and each of them, declares in unequivocal language that it cannot be used to create any liability, and it expressly permits the state to interpose any legal or equitable defense, except the Statute of Limitations.

Where a claim is prosecuted under said statute upon an allegation that the failure of the banks was due to the tortious and negligent acts of the officers, agents and servants of the state, the defense that the state is not liable therefor must be given its legal effect, which is, that it is a complete answer to the claim.

CLAIM against the state for loss of deposit by failure of bank.

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Louis Goldstein (Max D. Steuer, Albert Conway, Robert L. Luce, Ralph E. Hemstreet, John B. White and Thomas E. Shaw), of counsel, for claimant.

John C. Judge, of counsel, for Borough Bank depositors.

John M. Zurn, of counsel, for claimants in Claims B-14 to B-19 inclusive.

Whiteside Hill, for claimant in Chesebrough claims.

Coombs & Wilson (Joseph D. Senn, of counsel), for First National Bank of Brooklyn, etc.

Fletcher & Spencer (Robert H. Wilson, of counsel), for Joseph W. Blaisdell, etc.

McLean & Hayward, counsel in similar claims.

Carey D. Davie, James Gibson; George L. Meade, Deputy Attorneys-General, for the State of New York.

ACKERSON, P. J. The above claimant, Jennie Sherlock, was on the 5th day of April, 1910, one of the depositors of the Union Bank of Brooklyn, in the borough of Brooklyn, city of New York. On that day the said bank failed and closed its doors, as a result of which this claimant lost all of the money she then and there had on deposit, excepting the sum of twenty-four dollars and twenty cents, which was thereafter paid to her, the loss to this claimant being the sum of ninety-six dollars and seventy-two cents. Her claim alleges that the failure of the bank was due to the tortious and negligent acts of the officers, agents and servants of the state of New York. Thereafter, the legislature of this state passed an act which took effect on the 12th day of May, 1919, in form and manner following, to wit:

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"CHAPTER 581

"An Act to confer jurisdiction upon the court of claims to hear, audit and determine the claims of the depositors and creditors of the Union Bank of Brooklyn and the Borough Bank of Brooklyn and to make an award therefor.

Became a law May 12, 1919, with the approval of the Governor. Passed, three-fifths being present.

"*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

"SECTION 1. Jurisdiction is hereby conferred upon the court of claims to hear, audit and determine the claims of the depositors and creditors of the Union Bank of Brooklyn and the Borough Bank of Brooklyn, against the state of New York, for damages sustained through the failure of the said banks and each of them, and to make an award and render judgment therefor against the state of New York and in favor of said depositors.

"§ 2. The banking department shall, within three months after the passage of this act, present proof to the court of claims of the amount due each depositor of said banks.

"§ 3. No award shall be made or judgment rendered against the state, unless the facts proved shall make out a case which would create a liability were the same established by evidence in a court of law or equity against an individual or corporation; and in case such liability may be satisfactorily established, then the court of claims shall award to, and render judgment for the claimants for such sum as shall be just and equitable, notwithstanding the lapse of time since the accruing of damages provided the claim hereunder is filed with the court of claims within one year from the time this act takes effect, provided, however, that nothing in this act nor the passage of the

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same shall be deemed or construed to have acknowledged or created any liability on the part of the state, nor shall the passage of this act be construed as debarring the state from interposing any legal or equitable defense which it would otherwise have against the alleged claims except the statute of limitations.

"§ 4. This act shall take effect immediately."

Under and by virtue of this statute, the claimant filed her claim with the Court of Claims on the 2d day of April, 1920. Thereafter and on the 14th day of December, 1920, at a Special Term of this court held in the Kings county court house, in the borough of Brooklyn, aforesaid, the attorney-general moved to dismiss the claim on the following grounds:

"*First.* That said claim filed as aforesaid fails to state facts sufficient to constitute a cause of action against the State of New York.

"*Second.* That the State is immune from liability for any loss or damage sustained through or in consequence of the negligence, carelessness, malfeasance or other tortious acts of its officers, agents or employees.

"*Third.* That the State is immune from damages occasioned or arising out of the performance of a governmental function.

"*Fourth.* That the State has not assumed liability for damages caused by or arising out of the facts or transactions alleged and set forth in said claim, and has not waived any of its defenses to said claim other than the defense of the short statute of limitations, in consequence of the failure of the claimant to file a notice of intention herein as prescribed by section 264 of the Code of Civil Procedure."

The legislature must have supposed when it passed

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this act, that the act, in connection with the existing law as it had been construed and declared by the courts at that time, was a sufficient authorization to enable the claimant herein to recover damages against the state for the causes set forth in the claim, provided the negligent and tortious acts of the officers, agents and servants of the state as therein set forth could be proven to the satisfaction of the court, and provided that the amount of damages therein alleged to have been suffered could be properly established by legal evidence. This is to be assumed because the act itself provides in the 3d section thereof, " that nothing in this act nor the passage of the same shall be deemed or construed to have acknowledged or created any liability on the part of the state, nor shall the passage of this act be construed as debarring the state from interposing any legal or equitable defense which it would otherwise have against the alleged claims except the statute of limitations."

However, the Court of Appeals, on the 6th day of January, 1920, in the case of *Smith* v. *State of New York*, 227 N. Y. 405, declared the law of the state in relation to the principle with which we are concerned, in the following language:

" The question presented by the appeal is an important one. It is whether the immunity of the state from liability for the tortious acts of its officers and agents has been waived by section 264 of the Code of Civil Procedure. * * *

" The rule is well settled that the state is not liable for injuries arising from the negligence of its officers and agents unless such liability has been assumed by constitutional or legislative enactment." P. 408.

" It is contended by the respondent, and he has been sustained by the Court of Claims and Appellate Division, that the state has assumed this obligation

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by the enactment of the section of the Code of Civil Procedure to which reference has been made. I am of the opinion the section does not bear such construction. It was not enacted, as it seems to me, for the purpose of extending or enlarging the liability of the state, but solely for the purpose of declaring the jurisdiction of the Court of Claims, before which questions of liability might be tried." P. 409.

"But it is thoroughly established that by consenting to be sued, the state waives its immunity from action and nothing more. It does not thereby concede its liability in favor of the claimant or create a cause of action in his favor which did not theretofore exist. It merely gives a remedy to enforce a liability and submits itself to the jurisdiction of the court, subject to its right to interpose any lawful defense. (*Roberts* v. *State of New York,* 160 N. Y. 217.) Immunity from an action is one thing. Immunity from liability for the torts of its officers and agents is another. Immunity from such liability may be waived by some positive enactment of the legislature. This, as I read the section of the Code under consideration, the legislature has not yet done." Pp. 409, 410.

"* * * There certainly is not in the section an express waiver of the state's immunity from liability for the tortious acts of its officers and agents and the words used will not, in my opinion, permit of such construction. * * * The immunity of the state from liability for the torts of its agents is based, as I have already indicated, upon the broad ground of public policy and it is not waived by a statute conferring jurisdiction only. In the absence of a legislative enactment specifically waiving this immunity, the state cannot be subjected to a liability therefor." P. 410.

It has been argued that the legislature by the first

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part of chapter 581 of the Laws of 1919 specifically waived the immunity of the state from liability. But the act must be read as a whole, and the court is obliged to give effect to the latter part of the statute as well as to the preceding part. Whatever construction may be given to the language in the first part of the statute, only one meaning can be given to the following provision: "Provided, however, that nothing in this act nor the passage of the same shall be deemed or construed to have acknowledged or created any liability on the part of the state, nor shall the passage of this act be construed as debarring the state from interposing any legal or equitable defense which it would otherwise have against the alleged claims except the statute of limitations."

This language is clear and unambiguous and admits of no other interpretation on the part of the court. It must prevail over any construction of the previous sentences which conflict with it. It speaks for itself. It does two things:

*First.* It expressly forbids the court from construing the act as creating any liability on the part of the state. It is admitted that under the law as declared by the Court of Appeals in *Smith* v. *State, supra,* there was no liability before this act was passed; there is none thereafter, because the statute says in unequivocal language that it cannot be used to create any liability.

*Second.* It expressly permits the state to interpose any legal or equitable defense except the Statute of Limitations. Therefore, the defense that the state is not liable for the tortious acts of its officers, agents and servants, has not been waived, and we find the state in this proceeding vigorously urging it. The state is only doing that which the statute in express and unequivocal terms gives it the right to do, and



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the court must give this defense its legal effect, which is, that it is a complete answer to this claim.

We may say, however, in all fairness to the legislature which enacted chapter 581 of the Laws of 1919, and in explanation of its action, that as the decisions of this state existed when that act was passed, said act would have been sufficient to permit this claimant to have her claim heard and considered on its merits before the Court of Claims of this state, because at that time section 264 of the Code of Civil Procedure had been construed by the Appellate Division in the third department of this state as being sufficient authority to enable the Court of Claims to make an award to a claimant for damages alleged to have been suffered through the negligent and tortious acts of the officers, agents and servants of the state. The Hon. Irving G. Vann, formerly a judge of the Court of Appeals of this state, acting as an official referee, decided the case of *Arnold* v. *State of New York* in favor of the claimant. The case was appealed to the Appellate Division in the third department, in which the judgment given by Judge Vann was unanimously affirmed on the opinion of the referee. *Arnold* v. *State of New York,* 163 App. Div. 253, 261. The opinion thus unanimously indorsed by the Appellate Division contained this language: "While the State, being a sovereign, cannot be sued by a subject without its consent, by one of its own statutes passed as an act of justice to its subjects it has expressly assumed liability for damages caused by 'a wrongful act, neglect or default' on its part and has authorized the Board of Claims to hear and determine all claims founded on its negligence, which necessarily means the negligence of its own officers acting within the apparent scope of their powers, or while engaged in conducting its business. (Code Civ. Proc. § 264.)

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It has also provided that its liability in such and other cases shall be measured by ' such legal evidence as would establish liability against an individual or corporation in a court of law or equity.' (Id.)

" The history of legislation on the subject shows progressive growth from 1870 to 1911, with continuous enlargement of power to determine claims against the State. If the language of the statute fails to include such claims as those now under consideration, it is difficult to see what language would. The officers of the State are like the officers of a corporation and bind the State in the same manner by acts done within the limits of their authority. While the Commissioners were not authorized to be negligent any more than the officers of a corporation are so authorized, still they had the capacity to be negligent, and if, in holding a fair for the State they were negligent, it was the negligence of the State just as the negligence of officers of a corporation is the negligence of such corporation. Otherwise the assumption of liability by the State for damages caused by ' a wrongful act, neglect or default on the part of the State ' would be meaningless and without effect. How can the State be guilty of a wrongful act, neglect or default except through its ' officers and employees,' and if those words were inserted in the statute it would not add to its meaning. (*Sipple* v. *State,* 99 N. Y. 284, 288.) The evidence of negligence in these cases would completely overwhelm a private individual or corporation, and the situation is the same in principle, although the State is defendant. (*Quayle* v. *State of New York,* 192 N. Y. 47, 51; *Bowen* v. *State of New York,* 108 id. 166; *Burks* v. *State of New York,* 13 Court of Claims, 153; less fully reported, *sub nom. Burke* v. *State of New York,* 64 Misc. Rep. 558.)" Also see

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Judge Rodenbeck's opinion in the case of *Burks* v. *State of New York*, 13 Court of Claims Rep. 153.

Such having been declared to be the law of this state, the legislature was fully warranted, on the 12th day of May, 1919, in assuming that the act in question was fully adequate to permit this claimant to be heard before the Court of Claims and to have her claim decided upon its merits, because the only act necessary by the legislature was to waive the Statute of Limitations, and section 264 of the Code of Civil Procedure, under the decision in *Arnold* v. *State of New York*, *supra*, did the rest.

But, as before stated, the decision of the Court of Appeals, in *Smith* v. *State of New York*, *supra*, decided on the 6th day of January, 1920, about eight months after the passage of the enabling act, determined that such was not the law. This claim, therefore, must be dismissed. The Court of Claims cannot consider the merits under the enabling act in this case.

CUNNINGHAM, J., concurs.

Claim dismissed.

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TOBIAS TILE COMPANY, INC., Plaintiff, *v.* TOPPING REALTY COMPANY, INC., Defendant.

(County Court, Bronx County, February, 1921.)

**Costs — Bronx County Court — when security for costs not required — Code Civ. Pro. § 3268 — Bronx County Act (Laws of 1912, chap. 548).**

A domestic corporation, whose principal place of business is in the city of New York, as plaintiff in an action brought in the County Court of Bronx county against one of its residents, may not be required to give security for costs under section 3268 of the Code of Civil Procedure.

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Misc.] County Court, Bronx County, February, 1921.

Section 3268 of the Code of Civil Procedure and the "Bronx County Act" (Laws of 1912, chap. 548) must be read together, and a motion to vacate an order requiring the plaintiff to file security for costs will be granted.

APPLICATION to vacate an *ex parte* order requiring plaintiff to give security for costs.

Robert S. Mullen, for plaintiff.

Bobbe & Brown, for defendant.

GIBBS, J. This is an application to vacate an order of this court obtained *ex parte* requiring the plaintiff to give security for costs.

The plaintiff is a domestic corporation, organized and existing under and by virtue of the laws of the state of New York, and has its principal place of business in the city and county of New York. Defendant is a resident of Bronx county.

The order requiring that plaintiff furnish security for costs is based upon section 3268 of the Code of Civil Procedure. The section reads as follows:

Section 3268: "The defendant, in an action brought in a court of record, may require security for costs to be given, as prescribed in this title, where the plaintiff was, when the action was commenced, either

"1. A person residing without the state; or, if the action is brought in a county court, except in the counties of Albany, Kings, Queens, Rensselaer and Richmond, or in the city court of the city of New York, the city court of Yonkers, or the city court of Albany, residing without the city or county, as the case may be, wherein the court is located; or * * *."

It is settled that the term "person" used in said act, includes a corporation. *Sherin Special Agency* v. *Seaman*, 49 App. Div. 33.

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Section 3268 of the Code of Civil Procedure was reenacted from 2 Revised Statutes, 620, part 3, chapter 10, title 2. The original act provided that "When a suit shall be commenced in any court, 1. For a plaintiff not residing within the jurisdiction of such Court or * * *. The defendant may require such plaintiff to file security for the payment of the costs that may be incurred by the defendant in such suit or proceeding."

In other words, a person who brought suit in the County Court of a county of which he was not a resident, was required to give security at the instance of the defendant.

The amendment to the Code of Civil Procedure in 1904 excepted from the general rule the County Courts of Kings, Queens and Richmond counties and the City Court of the city of New York. It is evident that the intention of the legislature in making this amendment was to permit persons residing in one of the counties comprising the city of New York to maintain actions in a County Court of the county in which they reside or of an adjoining county in the city of New York so long as that court had jurisdiction of the defendant, without the necessity of giving security for costs.

At the time of this enactment the borough of The Bronx was part of the county of New York and, therefore, included in the exception to the City Court of the city of New York. But in 1912 the borough of The Bronx was made a county by the act of the legislature known as the Bronx County Act.

The defendant corporation contends on this motion that insomuch as the borough of The Bronx was made a county separate and distinct from New York county and as there is no exception in section 3268 of the Code of Civil Procedure as to the Bronx County

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Court, the plaintiff should be compelled to file security for costs. It cites a number of cases where security for costs has been required of the plaintiff in actions brought in many courts but none of them were actions brought in the County Courts of any of the counties comprising the city of New York.

Counties as to their corporate existence are completely within the control of the legislature. They may be changed, altered, enlarged, diminished or extinguished by the mere act of that body. Bronx county was created by chapter 548 of the Laws of 1912.

Section 3 of said act provides in part that: "There shall be a county court and a surrogate's court in and for the county of Bronx with all the jurisdiction and powers respectively vested in said courts by the constitution and the general laws relating to the county courts and surrogates' courts respectively in the several counties of this state now included in the city of New York except as hereinafter provided * * *."

Section 7 provides: "The county court within the county of Bronx on and after the first day of January, nineteen hundred and fourteen, shall have the same jurisdiction over civil and criminal actions and special proceedings as is now exercised under the provisions of law by the county court of the county of Kings."

The County Court of Bronx county, being a court of limited jurisdiction, has only such jurisdiction and powers as is conferred upon it by statute. By reason of the act which created the county, the County Court has all the jurisdiction and powers vested in courts by the Constitution and general laws relating to County Courts in the city of New York, particularly Kings County Court. Laws of 1912, chap. 548, § 7.

If the case at bar had been instituted in Kings

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county, and the County Court of that county had jurisdiction over the person of the defendant, the plaintiff would not be required to give security for costs. Code Civ. Pro. § 3268.

If Bronx county is an exception to the general rule, it must be that the legislature intended it to be so, by the act creating the county. In other words, did the legislature by enacting the Bronx County Act read into section 3268, Code of Civil Procedure, "the County of Bronx," as an exception to the general rule? I believe it did.

Statutes relating to costs are generally taken strictly as being a kind of penalty and as creating liabilities which did not exist at common law. Suth. Stat. Const. § 718.

But provisions of an act requiring security for costs should be liberally construed to accomplish the object in view when passed. *Fogg* v. *Edwards*, 57 How. Pr. 290.

It is obvious that in 1904 when section 3268 of the Code of Civil Procedure was amended so as to except from the general rule the County Courts of Kings, Queens and Richmond and the City Court of the city of New York, it was the intention of that body to make it possible for a plaintiff residing in any of the counties comprising the city of New York to institute an action in any County Court in New York city, without giving security for costs. It was the intention that an action could be brought in the City Court of the city of New York against a resident of Bronx county without the necessity of giving security. I do not believe the legislature desired to alter the situation because the borough of The Bronx was made a county and the County Court created, as it still remains one of the boroughs of the city of New York. It simply meant to apply all laws relating to the

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County Courts of New York city to the Bronx County Court. It sought to avoid the necessity of amending every statute pertaining to these courts by adding the words "Bronx County Court" to each of them.

I am therefore of the opinion that section 3268 of the Code of Civil Procedure and chapter 548 of the Laws of 1912, known as the "Bronx County Act" must be read together. The motion to vacate the order requiring the plaintiff to give security for costs is granted, with ten dollars costs.

Motion granted, with ten dollars costs.

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## Matter of the Estate of LENA MCMULLEN, Deceased.

(Surrogate's Court, New York County, February, 1921.)

**Transfer tax — transfer of stock of foreign corporation owning real estate within the state of New York, the stock of which is owned by a non-resident decedent, is taxable — constitutional law — Tax Law, § 220(2).**

The provision of section 220(2) of the Tax Law fixing for the purposes of a transfer tax the interest of a non-resident decedent in shares of stock in a foreign corporation owning real estate in the state of New York, as such proportion of the value of decedent's stock as said real estate bears to the value of the entire property of the corporation, wherever situated, is a valid exercise of the taxing power and is constitutional.

Even if at the time of decedent's death the certificate was not in this state, the transfer of his interest as stockholder in the real property here would be taxable.

The language of said section 220(2) is not confined to corporations exclusively engaged in holding real estate but applies to all foreign corporations owning real estate in the state of New York.

APPEAL from an order assessing transfer tax.

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White & Case (Joseph F. McCloy and Thomas A. S. Beattie, of counsel), for appellant.

Lafayette B. Gleason (Schuyler C. Carlton, of counsel), for State Comptroller.

FOLEY, S. On this appeal the executor contends that section 220, subdivision 2, of the Tax Law is unconstitutional and void in so far as it taxes the transfer of shares of stock owned by a non-resident in a foreign corporation owning real estate within the state of New York. The decedent died May 20, 1919. The appraiser reports that an interest in 500 shares of the Atlantic, Gulf and Pacific Company, a West Virginia corporation, is taxable. That company is engaged in dredging and owns real estate in New York city valued at $600,000, and total assets of approximately $2,500,000. Its principal place of business and stock transfer office are located in New York. The taxable interest is fixed by the statute as such proportion of the value of decedent's stock as the value of the real estate owned in New York bears to the value of the entire property of the company wherever situated. The executor contends:

*First.* That the shares of stock are not within the taxing jurisdiction of the state of New York, and that the legal situs of the stock is either in the state of incorporation (West Virginia), or in the residence of the decedent, in this case Connecticut. *Matter of Bronson,* 150 N. Y. 1; *Matter of James,* 144 id. 6; *Matter of Enston,* 113 id. 174.

*Second.* That if the act is constitutional, it applies only to stock in corporations *exclusively* engaged in the ownership of real estate and therefore it is not applicable to the stock in this estate.

I am of the opinion that the statute is constitutional

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and that the transfer was taxable. "As to residents, the transfer tax is on the succession, and is imposed on the right of succession; but as to non-residents it is a tax on the transfer of property within the jurisdiction of the court." *Matter of Bishop,* 82 App. Div. 112, 115. The stock certificate was actually located in this state at the time of the death of this testatrix and therefore was property taxable within our jurisdiction. *Matter of Romaine,* 127 N. Y. 80; *People ex rel. Wynn* v. *Grifenhagen,* 167 App. Div. 572; *People ex rel. Hatch* v. *Reardon,* 184 N. Y. 431; *Matter of Barbour,* 185 App. Div. 445, 454; *Matter of Whiting,* 150 N. Y. 27–30; *Simpson* v. *Jersey City Contracting Co.,* 165 id. 193. The legislature might have taxed the full value of the stock, but it has levied a tax only upon a partial interest. The Court of Appeals has sustained the constitutionality of the stock transfer tax (Tax Law, § 270), and all the reasons supporting that statute apply here. *People ex rel. Hatch* v. *Reardon,* 184 N. Y. 431, 449; affd., 204 U. S. 152.

But even if the certificate was not in this state at the time of death, the transfer of the stockholder's interest in the corporate real property located here would be taxable. A review of the history of the statute is convincing. During the decade previous to its enactment in 1915, the formation of corporations (both domestic and foreign) to take and hold real estate had enormously increased. Our legislative and judicial policy, from the first enactment of the Transfer Tax Law up to 1915, has been to exempt a non-resident's stock in foreign corporations. This was so even if the certificates were found in this state at the time of death. *Matter of James,* 144 N. Y. 6. The policy, however, was changed to correct the abuses brought about by the increased corporate ownership of realty. A non-resident could avoid the

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tax by the conveyance of his real estate to a foreign corporation. *Matter of Richards,* 182 App. Div. 572, 575. To prevent this evasion, the amendment to subdivision 2 of section 220 was made by chapter 664 of the Laws of 1915. It must be remembered, however, that this subdivision does not apply to all foreign corporations, but only to those owning realty in this state. The legislature has levied certain taxes as a condition for doing business in the state. It has provided for a license tax which is paid on the basis of the capital stock employed in this state (Tax Law, § 181); and a franchise tax which is measured by the gross assets employed here (Tax Law, § 182). This section also applies to corporations engaged in buying, selling and holding real estate. The income tax is now assessed upon foreign corporations upon their net incomes derived from assets in this state. Tax Law, art. 9-a. The validity of these taxes has been sustained, in each instance, by the Court of Appeals. *People* v. *Home Ins. Co.,* 92 N. Y. 328; *People ex rel. Wall & Hanover St. Realty Co.* v. *Miller,* 181 id. 328; *People ex rel. Alpha P. C. Co.* v. *Knapp,* 230 id. 48. If such taxes based upon property in this state were valid deductions before the payment of dividends to the stockholder, the transfer of his "interest," represented by this property within the state, is likewise clearly taxable at his death. The legislature has expressly imposed in subdivision 2 of section 220 a tax upon the transfer of "shares of stock, bonds, notes, or other evidences of *interest in any corporation.*" The definition of a stockholder's interest in the corporation is set forth in *Matter of Bronson,* 150 N. Y. 1, 8, as follows: "The corporation has the legal title to all the properties acquired, * * * but it holds them for the pecuniary benefit of those persons who hold the capital stock. * * * Each share represents

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a distinct interest in the whole of the corporate property." *Cass* v. *Realty Securities Co.*, 148 App. Div. 96, 100; *U. S. Radiator Co.* v. *State of New York*, 208 N. Y. 144, 148; *Hatch* v. *Reardon*, 204 U. S. 152, 162. Or as stated by Nelson, J., in *Van Allen* v. *Assessors*, 3 Wall. (U. S.) 573: "This is a distinct independent interest or property, held by the shareholder like any other property that may belong to him." In *Matter of Whiting*, 150 N. Y. 27, 30, it was held: "The law clearly distinguishes 'written instruments themselves' from 'the rights or interests to which they relate' * * * and makes either taxable. * * * When the design of the legislature is to tax the transfer of everything that it has power to tax, there is no inconsistency in taxing in one form if another is not available." Our courts have recognized the distinction between the interest of the stockholder in the whole corporation, and his interest in part of specific property located in this state. *Matter of Cooley*, 186 N. Y. 220; *Matter of Thayer*, 193 id. 430. New York realty owned by non-residents is unquestionably the subject of a transfer tax. *Matter of Barbour*, 185 App. Div. 445, 454; *Matter of Bishop*, 82 id. 112. There is no essential difference between a transfer tax upon the *individual* ownership of realty, and a transfer tax upon the individual share of the stockholder in the corporate realty. *Matter of Bronson*, 150 N. Y. 8. The ultimate jurisdiction rests upon the *situs* of the corporate real property in this state. The statute clearly and justly places upon the same plane, for transfer tax purposes, the ownership of realty either by our own residents—individual and corporate—or by non-residents and foreign corporations. The sweeping powers of the legislature in assessing transfers of property are clearly defined by Judge Crane in *Matter of Watson*,

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226 N. Y. 384; affirmed by United States Supreme Court (*Watson* v. *State Comptroller*, 254 U. S. 122), which recently sustained the constitutionality of a transfer tax under section 221b, Tax Law. He states: "The taxing power both direct and through an inheritance tax, is very broad, and submits to few restrictions. Such laws need not be submitted to courts for their approval and can only meet with disapproval when some fundamental principle has been violated. * * * Every presumption is in favor of the constitutionality of an act of the legislature and if the Constitution and the act can be reasonably construed so as to enable the latter to stand, it is the duty of the courts to give them that construction. (*People ex rel. Met. St. Ry. Co.* v. *Tax Commissioners*, 174 N. Y. 434, 437.)"

The legislature in explicit language has declared that the transfer of stock in these corporations shall be taxed, and the statute is clearly a valid exercise of the taxing power.

Upon the executor's second contention, I hold that the language of subdivision 2, section 220, is not confined to corporations *exclusively* engaged in holding real estate, but must be extended to all foreign corporations owning real estate in New York. If the legislature desired to so limit the scope of the subdivision it had the necessary language, in another section of the Tax Law (§ 210) where the language used is "corporations wholly engaged in the purchase, sale and holding of real estate for themselves." No such restrictive language was used in section 220, subdivision 2. Likewise, if real estate corporations only were intended to be taxed, it would have been futile for the legislature to have made the exceptions to the general class of foreign corporations recited in the subdivision, viz., a moneyed corporation, railroad or transportation, or a public service or manufactur-

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ing corporation. The statute must be held, therefore, to apply to a foreign corporation like the Atlantic, Gulf and Pacific Company. The appeal of the executor is denied.

Order reversed.

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## Matter of the Estate of BENJAMIN FRANKLIN LEE, Deceased.

(Surrogate's Court, New York County, February, 1921.)

**Wills — construction of — when trust cannot be terminated by merger — Personal Property Law, § 15.**

Where testator, whose estate consisted solely of personal property, gave one-half of it to his executors in trust for the benefit of his daughter for life or until her marriage, the trust is indestructible under section 15 of the Personal Property Law, and her interest in the income cannot be transferred or merged in the remainder so as to terminate the trust.

Where the sons of testator predeceased him, the claim of the daughter, his only surviving child, who is still unmarried, to be presently entitled to the possession and enjoyment of the entire estate because of an alleged merger of her interest as sole beneficiary and remainderman, will be denied.

While she is immediately entitled to one-half of the estate a successor trustee of the other half will be appointed.

PROCEEDING upon the judicial settlement of the accounts of a trustee.

James T. Kilbreth, for petitioners.

Henry G. Schackno, for Caroline King Lee.

FOLEY, S. On this accounting a question of construction arises. A fair interpretation of this will is that the testator gave one-half of his estate in trust to his executors to receive and apply the income for

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the benefit of his only daughter during her life or until her marriage. This trust is a trust in personalty only. The daughter is still unmarried and is now the only surviving child of the testator. Her three brothers died after the testator, and she is at present entitled not only to one-half the income, but to the whole remainder. She claims, however, that she is presently entitled to the possession and enjoyment of the entire estate because there was a merger of her interests as sole beneficiary and remainderman. With this contention I do not agree. The trust created by the first codicil was one to receive income and to apply it to her use. Such a trust is indestructible. Pers. Prop. Law, § 15. The interest of the beneficiary of the trust to receive the income for her life cannot be transferred or merged in the remainder so as to terminate the trust, nor can the payment of the principal of the fund to the person in whom are vested both the life estate and the remainder be made. *Dale* v. *Guaranty Trust Co.*, 168 App. Div. 601; *Cazzani* v. *Title Guar. & Trust Co.*, 175 id. 369; affd., 220 N. Y. 683; *Matter of Wentworth*, 230 N. Y. 176. The sole surviving trustee having died, the Central Union Trust Company of New York will be appointed successor trustee of the one-half of testator's estate provided for in the first codicil. Caroline King Lee is entitled to the other one-half immediately. Tax costs and submit decree on notice.

Decreed accordingly.

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## 17 AND 19 EAST 95TH STREET, INC., Plaintiff, v. HAROLD BERNSTEIN, Defendant.

(Municipal Court of the City of New York, Borough of Manhattan, Ninth District, February, 1921.)

**Landlord and tenant — when action for use and occupation maintainable — lease — election — Laws of 1920, chap. 944, §§ 5, 6.**

Where premises in the city of New York were leased for dwelling purposes for one year ending September 30, 1920, an action to recover the reasonable value of the use and occupation of the premises for the months of October and November, 1920, during all of which time the defendant was in possession, is an election on the part of the plaintiff to regard the defendant as a tenant and not as a trespasser, and such election is conclusive upon both parties.

Under the provisions of sections 5 and 6 of chapter 944 of the Laws of 1920, by which the legislature intended to confer upon the owner of residence property, such as here, a right of action to secure a fair and reasonable rent, an action to recover for use and occupation is maintainable and the plaintiff is not necessarily limited to a recovery of the same rent as was reserved in the lease, which has expired.

MOTION by defendant for judgment on the pleadings.

Scott, Gerard & Bowers (Victor House, of counsel), for plaintiff.

Solon B. Lilienstern, for defendant.

LAUER, J. This is a motion made by the defendant for judgment on the pleadings and on certain stipulations in regard to the facts agreed to by the parties. It appears that this action is brought by the plaintiff as owner of the building 17–19 East Ninety-fifth street to recover the value of the use and occupation of an apartment therein occupied by the defendant. The



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defendant is in possession of the premises holding over after the expiration of a term stated in a lease dated April 18, 1919, made by the plaintiff's grantor, the estate of W. H. Langley. The term of the lease was for one year commencing October 1, 1919, and ending September 30, 1920. The rental stated in the lease was the annual sum of $720, payable in equal monthly installments of $60. The action was brought to recover the sum of $266.67 for the period from October 1, 1920, to November 30, 1920, during all of which time the defendant was in possession. According to the stipulation the defendant tendered to the plaintiff the sum of $60 in the month of October, 1920, and $60 in the month of November, 1920, the same rent stated according to the terms of the lease which expired September 30, 1920. The plaintiff refused to accept these tenders, claiming them to be insufficient, and the defendant has deposited the sum of $120 in court to keep good his tender before suit.

The defendant claims that by reason of the commencement of the present action for use and occupation he is recognized by the landlord as a hold-over tenant and therefore the terms of the original lease under which the defendant held up to September 30, 1920, wherein he was to pay the monthly rental of sixty dollars, is renewed for a further period of a year upon the same terms and that his plea of tender before suit, kept good by the payment of the tender into court, constitutes a complete defense entitling him to judgment.

Both parties agree that prior to the enactment of the so-called housing laws of 1920, the proposition of law was well established that where a tenant held over under a written lease for a year or longer the landlord had his election of two, and only two, alternatives: *first*, either to regard the tenant holding over

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as a trespasser, or, *secondly,* to regard him as a tenant for another year under the same terms and conditions as those stated in the lease just expired. *Stern & Co.* v. *Avedon & Co., Inc.,* 111 Misc. Rep. 372; *Stevens* v. *City of New York,* 111 App. Div. 562; *Kennedy* v. *City of New York,* 196 N. Y. 19, 23; *Haynes* v. *Aldrich,* 133 id. 287; *Schuyler* v. *Smith,* 51 id. 308.

It may be that a tenant holding over after notice by the landlord of his intention to increase the rent will be regarded as a lessee for another year under the increased rent (*Stern & Co.* v. *Avedon & Co., Inc., supra; Despard* v. *Walbridge,* 15 N. Y. 374, 375) but this state of facts would be regarded as the making of a new contract rather than that of holding over. *Stern & Co.* v. *Avedon & Co., Inc., supra.* That is, the foundation for an implied contract would have been laid and that would be in law a virtual assent by the tenant to the terms prescribed in the notice of the landlord. *Despard* v. *Walbridge, supra.*

The question of whether a landlord serving a proper notice can impose liability upon a hold-over for a greater rental than that reserved in the lease, the term of which had expired, where the tenant dissents from the increase mentioned in the landlord's notice, although referred to in counsel's brief, is not directly involved in the present case. This seems to be the effect of the dictum of the justice who decided the case of *Machson* v. *Katz,* N. Y. L. J., Jan. 11, 1921. It may be observed that the authority for the annunciation of that rule is the case of *Lasher* v. *Heist,* 126 Ill. App. 82. A reference to that case indicates that it is based upon the law as laid down in the earlier case of *Hunt* v. *Bailey,* 39 Mo. 257, in which the following is stated as the principle: "If the tenant manifests his dissent from the terms proposed for increased rent, then no privity of contract

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will be created for the increased rent; and if he holds over, it will be considered on the terms of the lease by which he originally gained possession. In such case, the remedy of the landlord would be ousting the tenant from the possession, under the statute, if he objected to a continuance of the occupation according to the terms and conditions of the lease."

Of course, under the present statute in such a case as the present one, the landlord would not be entitled to oust the tenant from the possession, and this alternative remedy referred to does not presently exist in such a case as this.

Referring to this case of *Hunt* v. *Bailey,* the court in the case of *Moore* v. *Harter,* 67 Ohio St. 250, at page 254, says: "The better opinion and current of authority seem to be the other way," citing *Roberts* v. *Hayward,* 3 Car. & P. 432; *Brinkley* v. *Walcott,* 10 Heisk. (Tenn.) 22; *Reithman* v. *Brandenburg,* 7 Colo. 480; *Griffin* v. *Kinsley,* 75 Ill. 411. It was further said in the opinion in the case of *Moore* v. *Harter, supra:* "The tenant's dissent from the terms proposed by the landlord amounts to nothing unless the latter accepts it, because the presumption is that one holding over, after notice from the landlord that a change of terms would be required, is presumed to do so on the terms proposed by the landlord. Otherwise he would put himself in the wrong and would be liable to be treated as a trespasser."

The defendant contends, and in this respect I think his contention is well founded, that the commencement of an action to recover for use and occupation is an election on the part of the landlord to regard the tenant as a tenant and not as a trespasser. *Conrow* v. *Little,* 115 N. Y. 394; *Stevens* v. *City of New York, supra.* This election having been made it must be regarded that the tenant has been accepted as such

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and that election is conclusive upon both parties. "Neither can then claim that the tenant is a trespasser." *Stern & Co.* v. *Avedon & Co., Inc., supra.*

There is no material dispute between the parties up to this point. The plaintiff, however, claims that the present action for use and occupation is one which is maintainable under the provisions of chapter 944 of the Laws of 1920 and that that statute impliedly if not expressly justifies a landlord in maintaining an action against a tenant to recover the reasonable rental value of premises occupied by a tenant during the time the tenant is holding over.

Prior to the enactment of the so-called housing laws of 1920 a landlord could oust a tenant who held over after the expiration of the term of his lease either by an action in ejectment or by summary proceedings of dispossession. The remedy of a summary proceeding to remove a tenant from premises used for dwelling purposes in the city of New York is temporarily, until November, 1922, taken away from the landlord. Laws of 1920, chaps. 942, 947. One of the so-called housing laws also deprives a landlord of his right to recover double rental value in damages from a hold-over tenant under section 230 of the Real Property Law (Laws of 1920, chap. 138). As part of the housing laws a landlord is deprived of his right to maintain an action for ejectment. Laws of 1920, chap. 947. The Appellate Division of the Supreme Court of this department in the recent case of *Guttag* v. *Shatzkin,* 194 App. Div. 509, has declared this later statute as violative of the State Constitution.

In the light of these statutes what did the legislature intend should be the remedy of the landlord to recover proper and adequate rental from a tenant

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remaining in possession after the expiration of his term? Did the legislature intend that chapter 944 of the Laws of 1920 should supply this almost essential relief to a landlord, after depriving him of the control of his property so far as the ouster of a tenant in possession?

Chapter 944 provides, as did the earlier statute of the same year (Laws of 1920, chap. 136), that it shall be a defense to an action for rent that the rent reserved is unjust and unreasonable and that the agreement under which the same is sought to be recovered is oppressive. In that same statute it was provided (chap. 944, § 4), which also was contained in chapter 136 of the Laws of 1920, "that nothing herein contained shall prevent the plaintiff from pleading and proving in such action a fair and reasonable rent for the premises and recovering judgment therefor, *or from instituting a separate action for the recovery thereof.*" In other words, the landlord could, when suing for rent under an agreement, even though the defense of unjust and unreasonable rental which the statute permits to be set up, be sustained, nevertheless recover the "fair and reasonable rent" in that action or he may secure this "fair and reasonable rent" by "instituting a separate action for the recovery thereof." This section, according to the view that I entertain, furnishes sufficient justification for the maintenance of the present action. That this construction is a proper one is verified by reference to subsequent provisions of the same statute.

By section 5 of the same statute it is provided that (italics mine) "If in an action against the occupant of the premises for rent *or for the renewal value of the use and occupation thereof,* plaintiff recovers judgment by default, the judgment shall contain a provision," etc., and section 6 provides (italics mine)

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"If in any action for rent *or rental value* the issue of fairness and reasonableness of the amount demanded in the complaint be raised by the defendant, he must at the time of answering deposit," etc. It seems to me that by these provisions which I have quoted from chapter 944 of the Laws of 1920 the legislature clearly intended to give a landlord the right to maintain an action to recover a fair and reasonable rent or rental value of premises from the tenant even though that tenant was holding over under a lease the term of which had expired, and that the landlord is not necessarily limited to a recovery of the same rent as was reserved in the lease the term of which had expired.

The case of *Machson* v. *Katz,* recently decided by my associate Judge Robitzek (N. Y. L. J., Jan. 11, 1921) is not an authority covering the present issue before me. That was a decision in a case where it was sought to secure the reasonable rental value of premises from a monthly tenant where it was held that proper notice to terminate the original monthly tenancy had not been given. The question considered by me in the present case does not appear to me to have been decided in that case.

If the contention of the defendant were correct practically the only remedy of an owner of dwelling property against a hold-over tenant in such a case as this would be to accept him as a tenant for another year under the old lease regardless of the adequacy or inadequacy under changing conditions of the rental therein stipulated. I am of the opinion that this was not the intention of the legislature but on the contrary that by the provisions of chapter 944 of the Laws of 1920 before referred to it was intended to confer upon the owner of residence property such as this the right of action to secure a fair and reasonable rent or rental value.

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From the expression of these views it follows that the defendant's motion for judgment must be denied.

Under the stipulation entered into by counsel since the submission of this motion it is agreed that in the event of the denial of the defendant's motion judgment should be awarded for the plaintiff in the sum of $200. I give judgment in that amount in accordance with that stipulation.

Judgment for plaintiff.

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JOHN G. UNDERHILL, Plaintiff, *v.* JOSEPH M. SCHENCK, RICHARD H. HERNDON and JACINCTO BENAVENTE, Defendants.

(Supreme Court, Kings Special Term, March, 1921.)

**Injunctions — dramatic compositions — when licensee does not acquire motion picture rights — injunction pendente lite denied as to use of name.**

Under a grant by the author of a dramatic composition of the right to translate and adapt it into the English language and to perform or cause to be performed in said language, the licensee does not acquire the motion picture rights to the play. (Pp. 522, 523.)

Where subsequent to such a grant the author of the play transferred the motion picture rights therein to another, the licensee of the right of translation and spoken performance is not entitled, upon the theory of unfair competition, to an injunction *pendente lite* to restrain, in connection with any motion picture production of the play, the use of the title "The Passion Flower" which plaintiff devised for the spoken drama and of lines, captions and titles in the English language in connection with any such production.

MOTION for a preliminary injunction.

Paul Bonynge, for plaintiff.

Newmann & Newgass, for defendant Schenck.

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Elijah N. Zoline, for defendant Herndon.

Wingate & Cullen (Conrad S. Keyes, of counsel), for defendant Benavente.

ASPINALL, J. This is a motion for a preliminary injunction restraining the defendants from using the title "The Passion Flower," or any lines, captions or titles in the English language, in connection with any motion picture production of a dramatic composition by one of the defendants Benavente. The composition in question is a three-act drama entitled "La Malquerida," the English equivalent being "The Ill-Beloved." The composition was duly copyrighted by the author Benavente in the year 1914 under the title "La Malquerida." In the year 1917, by written contract, the author granted to the plaintiff upon the terms and conditions therein specified "the sole right to translate and adapt into the English language, and to perform or cause to be performed in the said language, the drama in three acts entitled 'La Malquerida.'" The plaintiff thereupon prepared an English translation and adopted therefor the title "The Passion Flower," which he claims to have invented and devised. Thereafter and pursuant to a contract made in January, 1920, between the plaintiff and the defendant Herndon, the latter produced the drama under that name in many of the principal cities of the United States, including about 150 performances of said drama in the city of New York, and that public performances of said drama are still being given regularly and with great success. Both before and after the contract of January, 1920, the plaintiff and the defendant Herndon were negotiating for the acquisition by the latter of the motion picture rights. As a result, in or about February, 1920, an agreement was made between the plaintiff and the defendant

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Herndon by which the former assumed to transfer to the latter a one-half interest in and to the motion picture rights of the play "The Passion Flower" throughout the world, and Herndon gave to the plaintiff, as a part of the consideration, a check for $500. These negotiations were conducted in the belief that the author's approval could be obtained to any disposition of the picture rights by the plaintiff. Subsequently the check was returned to the defendant Herndon on the ground that the plaintiff had been advised that the picture rights of "La Malquerida" had been disposed of through an agency in the city of Paris and "that, therefore the author is not able to make a contract concerning them." When the defendant Herndon learned that the author had transferred the picture rights for the world to one Gonzalez he immediately entered into negotiations with the latter, with the result that in June, 1920, he acquired all Gonzalez's rights under the latter's contract with the author. Subsequently, in October, 1920, the defendant Herndon sold and assigned to the defendant Schenck the picture rights for a consideration of $25,000. The defendant Schenck thereupon began the preparation of a photoplay, in which a celebrated actress, Miss Norma Talmadge, was to star, upon a scale that already has involved an expenditure of over $100,000 and will require further and large additional expenditures, and besides has incurred important contractual obligations. The contemplated production under the name of "The Passion Flower" has been widely advertised. This being the situation, the plaintiff seeks injunctive relief as before stated.

In my opinion the plaintiff never acquired the picture rights to the drama. The grant from the author does not expressly transfer such rights and the language employed is too restricted to embrace them by

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implication. The right conferred by the grant is "to translate and adapt into the English language, and to perform or cause to be performed in the said language * * *." A motion picture play is not a performance in the English or in any other language. Its chief characteristic is that it is a performance practically without language. Such words, phrases and short sentences as are thrown upon the screen at intervals for purposes of elucidation and explanation are not necessarily taken from the spoken drama. It seems quite clear to me from the phraseology of the grant by the author to plaintiff that the parties contemplated the presentation of the drama, as translated by the plaintiff, upon the stage, by speaking actors. See *Klein* v. *Beach*, 239 Fed. Repr. 108; 232 id. 240. This case distinguishes *Frohman* v. *Fitch*, 164 App. Div. 231; and that case is further distinguishable by the broader language of the grant. Moreover, the plaintiff does not seriously contend that he possesses the picture rights to the drama. In the prayer of the complaint, he does not ask for an injunction to prevent the production of any photoplay, but only for an injunction against the use of the title "The Passion Flower" and of any lines, captions and titles in the English language in connection with any such production. Such also is the language of the order to show cause, and in his brief he urges that even if he has not acquired "in express terms" the right to make a picture production of the drama "it is clear that his sole right to translate and adapt into English is ample to prevent *any such* production by another."

The plaintiff's real contention is that he devised or invented the title "The Passion Flower" for the spoken drama and that its appropriation by the defendants for the contemplated photoplay is the vio-

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lation of a right exclusive to himself and so constitutes unfair competition. It may be here said that his claim to be the originator of this title is not substantiated by the records in the copyright office, which disclose that this identical title has been previously adopted by others in connection with both dramatic and literary compositions; but this is immaterial, for relief in equity lies to the adopter and user of a title, not to the inventor of it. Frohlich on Motion Pictures, § 121; *Dickey* v. *Mutual Film Corp.*, 160 N. Y. Supp. 609. It must be conceded that the plaintiff first adopted the title for his spoken drama. But priority of adoption and use alone is not sufficient, for the plaintiff has no exclusive property right in the name "Passion Flower." The drama was not copyrighted under that title, nor was it ever so registered as a trade mark, name or label. It is the name of a flower. One of the definitions in the Century Dictionary is "any plant of the genus Passiflora." Any one may apply the name to a poem, a country estate or a race horse, as fancy dictates. To justify injunctive relief against the wrongful appropriation of a name or title, fanciful in its nature, there must be added to the requirement of priority of adoption the further essential that the title must have been so used as to have acquired a *secondary* meaning, which identifies it in the public mind with a particular composition, object or thing. *Manners* v. *Triangle Film Corp.*, 247 Fed. Repr. 301, 303; *Selig Polyscope Co.* v. *Unicorn Film Service Corp.*, 163 N. Y. Supp. 62; Frohlich on Motion Pictures, 410, § 121. These two essentials create a right akin to a property right which equity will protect against an unauthorized appropriation by another under circumstances that would work a fraud and deceit upon the public to the injury of the complainant. Plaintiff claims that the

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present situation meets the requirements of the rule. He claims (1) priority of adoption of the title; (2) that by the many performances given, the title acquired a secondary meaning by which it became identified in the public mind with the spoken play; and, (3) that the production of the photoplay under the same title would diminish the financial returns from the spoken play to his great injury. This, the plaintiff claims, entitles him to invoke the doctrine of unfair competition.

It has been said that this doctrine rests upon the principle "of common business integrity" and that the gist of the action "is not the harmless use of the particular words and symbols, but the appropriation of a competitor's business to his injury." The law is similar to that relating to trade marks. It is based primarily upon the theory that no one may, by the use of names, signs, symbols or marks, perpetrate a fraud upon the public by inducing the belief that his business, goods or product is that of another. It has also been said that fraudulent conduct "without damage will not suffice" (26 R. C. L. § 57, p. 882); also that the basis of actions of this character is damage to the complainant and not to the public. *Munn & Co.* v. *Americana Company,* L. R. A. 1916 D, 116, 117. Again, it has been asserted that the doctrine does not depend entirely upon an invasion of individual rights but also upon the principle that the public is entitled to protection against deception and fraud arising from the use of previously appropriated names and symbols. *Matsell* v. *Flanagan,* 2 Abb. Pr. (N. S.) 459, 461; *American Grocer Pub. Assn.* v. *Grocer Pub. Co.,* 51 How. Pr. 402, 403. The true rule, however, seems to be that equity intervenes to protect both the complainant and the public. Hopkins on Trade Marks (3d ed.), §§ 21, 22.

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In my opinion the plaintiff is not entitled to invoke the doctrine. The copyright law secures to an author the exclusive right to dramatization, and this includes the right to produce the drama or composition as a spoken play and as a picture play, these distinct rights being originally united in the author or composer. *Kalem Co.* v. *Harper Bros.*, 222 U. S. 55. In the present case, however, the grant from the author to the plaintiff transferred only the rights of the former in the spoken play. Whatever rights may have been acquired by the defendants by subsequent transfers from the author and his transferees, the plaintiff has the undoubted right to translate and perform as a spoken play. But the plaintiff, in exercising his admitted right in this respect, discarded the title of the author and substituted his own, adopting the name "The Passion Flower." In my opinion the plaintiff's act in this respect had a tendency to deceive the theatre-going public, for the reason that the public would not generally know that the spoken drama, produced under the title "The Passion Flower," depicted the same plot, characters and scenes as the copyrighted drama, "La Malquerida." Under the title "Plays of Jacinto Benevente" the plaintiff himself has copyrighted a book containing this drama under the name "La Malquerida." Did the public generally know that the drama contained in plaintiff's book was being produced as "The Passion Flower?" Did a person, who had read and possibly disapproved of "La Malquerida," know that he was to witness this drama when he purchased a ticket for "The Passion Flower?" Whether or not plaintiff's action in discarding the author's title and substituting his own subjects him to any criticism is not a question for me to determine, but it is quite apparent to me that it cannot be a ground for equi-

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table intervention. The plaintiff asks equity to compel the defendants to produce this photoplay under the title which he discarded or under some other title. The direct result of relief of this character would deceive the public as to the identity, in plot, characters and scenes, of the spoken play with the picture play. In my opinion the public is entitled to just such knowledge, and any application for relief in equity which involves the deception of the public in this respect does not commend itself to this court. If equity will enjoin, as it frequently does, the production of a photoplay under the *same* title as the spoken play because of the diversity of authorship, plot, characters and scenes, it will not compel the adoption of a *different* title for the photoplay when the authorship, plot, characters and scenes are identical. The ground upon which equity should intervene in the one case, and refuse to intervene in the other, is the same. To prevent any semblance of deception upon the public, equity will grant or withhold the relief sought as the occasion may require. In the present case, it seems to me that the relief which plaintiff asks would tend to deceive the public into the belief that a picture play presented under the title "La Malquerida" or some other title was not the drama produced under the title of "The Passion Flower."

Plaintiff complains of the possible injury resulting from the competition that would arise between the spoken drama and the picture play about to be produced by the defendant. That such competition may result from the simultaneous production of a spoken play and a picture play is recognized, and protection has been frequently afforded a plaintiff against a defendant who threatened to appropriate, wrongfully, the title of a spoken play and give it to a proposed picture play different in plot, characters, scenes and

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authorship. Usually, in such cases, it will be found that the entire right of dramatization was in the plaintiff. Many such cases are cited in Frohlich on Motion Pictures, beginning on page 413. In the present case, however, the plaintiff never acquired the picture rights, and the theory of his action is not the protection of any rights secured under the copyright. Plaintiff further contends that the grant to him of the right to translate and adapt into the English language negatives the right of the defendants to produce the proposed picture play. I do not agree with this contention. If I am correct in the view that the plaintiff acquired the rights to the spoken play only, the grant of the right to translate must be construed as limited to the requirements of the spoken play. Moreover, the defendant, Schenck, disclaims any intention of appropriating plaintiff's translation, but claims that he is making a motion picture production from the original play.

The plaintiff claims in point 5 of his brief that even if he did not acquire the right in express terms to make a motion picture production of the play, his "sole right" to translate and adapt into English is sufficient to prevent any such production by another. Citing *Manners* v. *Morosco*, 252 U. S. 317–325, 326. That was a suit to restrain the production of a motion picture play in violation of the copyright of the complainant, who was the author. The suit involved the question of infringement. But in point 1 of plaintiff's brief he distinctly states that he "does not complain of any infringement of copyright," but that this lawsuit is brought to test merely the title to literary property and "not an invasion or piracy of that property." If the suit were to prevent the production of a photoplay because of infringement of rights secured by the copyright, then the suit should have been begun

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in the Federal courts (Frohlich on Motion Pictures, § 121; *O'Neill* v. *General Film Co.*, 171 App. Div. 854–867); but if the purpose of the suit be, as plaintiff asserts, to prevent the use of the title "The Passion Flower," on the theory of unfair competition, I am of opinion that, for the reasons stated, the plaintiff has shown nothing entitling him to relief in equity.

Why reference was made to the plaintiff in this action in the agreement made on the 13th day of October, 1920, between the defendants Herndon and Schenck, I am not called upon to explain or determine on this motion, for the reason that all of the facts and circumstances connected with this controversy will undoubtedly be given in detail upon the trial of this action.

Motion for a preliminary injunction denied.

Motion denied.

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ELIZABETH B. BYRNE, Plaintiff, *v.* ELLEN McDONOUGH, Defendant.

(Supreme Court, Kings Special Term for Trials, March, 1921.)

**Specific performance — land contracts — principal and agent — parol evidence — Statute of Frauds.**

While a writing, not under seal, signed for an undisclosed principal by an agent renders him personally liable, the undisclosed principal may be held liable upon proof of the signer's agency.

The fact that the question arises under the Statute of Frauds does not change this rule, and parol evidence to show the existence of the principal neither offends the statute nor tends to vary the terms of the writing.

Where in a buyer's action for the specific performance of a land contract, not under seal, all disputed questions of fact were decided in favor of plaintiff, and the only contention was whether the writing, which was signed by the agent of



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the seller whose name did not appear, was a sufficient memorandum under the Statute of Frauds, the rule relating to an undisclosed principal applies, the writing is sufficient, and the plaintiff is entitled to judgment against the undisclosed principal.

ACTION for specific performance of an agreement for the sale of real property.

Michael J. Joyce, for plaintiff.

Hirsh, Newman & Reass (Benjamin Reass, of counsel), for defendant.

CROPSEY, J. The action is for specific performance of an agreement for the sale of real property. It is brought by the buyer against the seller. At the close of the trial the disputed questions of fact were decided in favor of the plaintiff. The court took under advisement the question of the sufficiency of the writing under the Statute of Frauds. The writing is as follows: "BROOKLYN, N. Y. *October 21st,* 1920.

"Received of Elizabeth B. Byrne sum of Five Hundred ($500) Dollars as binder on premises 132 Underhill Ave., Brooklyn, N. Y., under following terms and conditions:

"Price Twelve Thousand Five Hundred ($12,500) Dollars.

"Owner to take back a first mortgage for $7,000 for three years at 6% interest payable semi-annually.

"Five thousand ($5,000) to be paid on taking of title, which is not to be later than December 1st, 1920.

"LYONS & MASON,
"per F. J. LYONS."

Lyons & Mason, who signed this paper, were the duly authorized agents of the defendant. The only

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contention made against the sufficiency of the writing, under the statute, is that it is signed by an agent.

The name of the defendant does not appear in the writing. So far as the writing discloses Lyons & Mason, who signed it, would appear to be the sellers. There is nothing in the writing to show that they were merely agents though that was the fact. Where a writing not under seal is signed by one who is an agent but which does not disclose his agency or give the name of his principal the agent is personally liable. *Meyer* v. *Redmond,* 205 N. Y. 478. But the undisclosed principal may be held liable upon proof of the signer's agency. *Navarre H. & I. Co.* v. *American Appraisal Co.,* 156 App. Div. 795, 797; *City Trust, Safe Deposit & Surety Co.* v. *American Brewing Co.,* 182 N. Y. 285; *Case* v. *Case,* 203 id. 263. And the fact that the question arises under the Statute of Frauds does not change the rule. The undisclosed principal is liable the same as though the Statute of Frauds was not involved. *Dykers* v. *Townsend,* 24 N. Y. 57; *Briggs* v. *Partridge,* 64 id. 357, 362; *Langstroth* v. *Turner Cypress Lumber Co.,* 162 App. Div. 818; affd., 220 N. Y. 706. The Statute of Frauds is satisfied by such a writing because there is an enforceable agreement and that statute does not make any change in the law of principal and agent as between themselves or as to third parties. The Statute of Frauds is satisfied if the names of competent contracting parties appear in the writing. If the signer is an agent his principal may sue and be sued. The admission of parol proof to show the existence of the principal does not offend the statute nor vary the terms of the writing. The purpose of the proof is to give effect to the rule that an undisclosed principal may be held to a contract made by his authorized agent if the other party elects. See 24 L.

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R. A. (N. S.) 315–318, note. The rule is different if the writing is under seal. Then only the parties signing are liable. *Klein* v. *Mechanics & Traders Bank*, 145 App. Div. 617.

But if an agent signs in a manner indicating that he is only an agent and so as not to make himself personally liable but does not disclose his principal then the writing does not satisfy the requirements of the Statute of Frauds and the principal of the signer cannot be held liable. *Mentz* v. *Newwitter*, 122 N. Y. 491; *Ward* v. *Hasbrouck*, 169 id. 407; *Mertz* v. *Hubbard*, 75 Kan. 1; 8 L. R. A. (N. S.) 733–736, note. The reason underlying these decisions has already been indicated. It is that under the Statute of Frauds the writing must constitute an enforceable agreement and contain, among other essentials, the names of the parties. *Grafton* v. *Cummings*, 99 U. S. 100. So where the writing is executed by an agent in a manner that does not make him personally liable and his principal is not named there is no enforceable agreement under the statute.

Where the writing is signed by an authorized agent in his individual name, but shows on its face that it is not his personal obligation and that it is signed only for his principal who is named in it, it binds the principal. *Fox* v. *Hawkins*, 150 App. Div. 801; *Hager* v. *Henneberger*, 83 Misc. Rep. 417. In the situation just mentioned there is no undisclosed principal. The principal is liable because he is named in the writing and the writing is his contract being signed by his authorized agent.

In the case at bar the agents would be personally liable and the rule relating to an undisclosed principal is applicable and hence the writing is sufficient.

The decision already cited, *Mentz* v. *Newwitter*, 122 N. Y. 491, seems to have been reached upon the

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assumption that the signing by the auctioneer did not make him personally liable and as the principal's name did not appear in the writing there was no enforceable agreement. *Langstroth* v. *Turner Cypress Lumber Co.*, 162 App. Div. 818, 823. With that assumption in force the decision cannot be questioned. But in fact the memorandum in that case was signed by the auctioneer in his own name and not as an agent and he would seem to have been personally liable upon it (*Meyer* v. *Redmond*, 205 N. Y. 478; see, also, *Mills* v. *Hunt*, 20 Wend. 431–433); and so it would seem to have been a case for the application of the rule holding an undisclosed principal liable. But that point apparently was not urged by counsel or considered by the court and the cases of *Dykers* v. *Townsend*, 24 N. Y. 57, and *Briggs* v. *Partridge*, 64 id. 357, clearly so holding were not referred to in either brief or in the court's opinion. Certain it must be that there was no intention of overruling those cases or disapproving of the doctrine of holding an undisclosed principal when the subject was not discussed and no authorities were cited.

Plaintiff is entitled to judgment, with costs.

Judgment for plaintiff, with costs.

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EDWARD KUPCHICK, Respondent, *v.* HARRY LEVY et al., Appellants.

(Supreme Court, Appellate Term, First Department, January Term — Filed March, 1921.)

**Pledge — when doctrine of estoppel does not apply — conversion — evidence.**

Where in an action for conversion the evidence is convincing that, notwithstanding a memorandum signed by one at the time

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plaintiff delivered to her a watch, it was to remain the property of plaintiff and be returned on demand, she was intrusted with the possession of the watch for the purposes of sale, she must be deemed the true owner, and a judgment against the defendant with whom she pawned the watch will be reversed and the complaint dismissed.

It appearing that defendant had no knowledge of and did not rely on any previous dealings between plaintiff and the pledgor, the doctrine of estoppel did not apply.

McCook, J., concurring.

APPEAL by defendants from a judgment of the Municipal Court of the city of New York, borough of Manhattan, first district, in favor of the plaintiff.

Michael J. Sweeney, for appellants.

Jacob M. Kram, for respondent.

GUY, J. I am of the opinion that the doctrine of estoppel has no applicability, as the pledgee had no knowledge of and did not rely upon any previous dealings between plaintiff and Bonner, the pledgor.

The evidence of plaintiff's salesman is convincing that notwithstanding the memorandum signed by the pledgor, she was "entrusted with the possession" of the merchandise in question "for the purpose of sale," and must be "deemed to be the true owner thereof" to the extent of giving validity to her contract with defendant, pledging said merchandise for moneys advanced to her. *Thompson* v. *Goldstone,* 171 App. Div. 666, 668.

Judgment reversed and complaint dismissed, with thirty dollars costs in this court and costs in the court below.

MCCOOK, J. (concurring). Action for conversion of a watch. The facts are conceded. Plaintiff is a jeweler in this city. In January, 1920, he delivered

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to one Anna Bonner a watch of the value of $400, at the same time taking from her a receipt or memorandum upon which was printed the following:

"These goods are sent for your inspection and remain the property of Ed. Kupchick, and are to be returned on demand. Sale takes effect only from date of approval of your selection, and bill of sale rendered."

The Bonner woman pawned the watch with defendants, obtaining the sum of $250 thereon. Defendants had no knowledge of this transaction, or of other dealings between plaintiff and Anna Bonner. After the death of the woman, plaintiff, by the aid of the police, located the watch in defendants' pawnshop and demanded same. Defendants refused to deliver the watch unless they were repaid the loan made to Anna Bonner, with interest. Plaintiff brings this action to recover the value of the watch.

Plaintiff's salesman, who delivered the watch to Bonner, testified that he had delivered goods to her on six, seven or eight occasions, a receipt similar to the one in this case being given. He stated that on some occasions she returned the goods, and on others paid for them. Plaintiff had been doing business with her in this manner for about eighteen months. He further testified that when persons take articles out on memorandum "some of them take them out for sale and some of them for themselves." "When we give out to people, we don't ask what they are going to do with the watch." "I don't know what she done with the article; it is not my business what she is doing with it. We take it a memorandum. If they don't return that article, they have to pay for the article."

Plaintiff's contention is that title did not pass, and, therefore, he is entitled to recover his property or its

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value. Defendants claim that while it may be true title did not pass, nevertheless under the circumstances plaintiff is estopped from asserting title against a *bona fide* purchaser or lienor such as defendants. *Smith* v. *Clews,* 114 N. Y. 190. They also rely on the Factors' Act.

The Factors' Act is section 43 of the Personal Property Law, and subdivision 1 reads as follows:

"Every factor or other agent, entrusted with the possession of any bill of lading, custom-house permit, or warehouseman's receipt for the delivery of any merchandise, and every such factor or agent not having the documentary evidence of title, who shall be intrusted with the possession of any merchandise for the purpose of sale, or as a security for any advances to be made or obtained thereon, shall be deemed to be the true owner thereof, so far as to give validity to any contract made by such agent with any other person, for the sale or disposition of the whole or any part of such merchandise and any account receivable or other chose in action created by sale or other disposition of such merchandise, for any money advanced, or negotiable instrument or other obligation in writing given by such other person upon the faith thereof."

In *Thompson* v. *Goldstone,* 171 App. Div. 666, 668, the court construed this section as follows: "The expression in the final sentence of subdivision 1 of section 43 of the Personal Property Law (Factors' Act), 'upon the faith thereof,' means upon the faith of such possession." The court in the *Thompson* case also said (p. 668): "Notwithstanding that there may have been this limitation upon the agency of Shattuck, if the defendant appeared as an innocent person who dealt with Shattuck in reliance upon Shattuck's apparent ownership resting upon his pos-

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session, the defendant could not be affected by the character of such possession of which the defendant had no notice, either actual or constructive." See, also, *Schmidt* v. *Simpson,* 204 N. Y. 434, 438.

Judgment reversed, complaint dismissed, with thirty dollars costs in this court and costs in court below.

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J. STUART SNEDDON, Respondent, *v.* JOHN BARTON PAYNE, Director General of Railroads, etc., Impleaded, etc., Appellant.

(Supreme Court, Appellate Term, First Department, January Term — Filed March, 1921.)

**Negligence — action to recover for loss of a handbag — master and servant — evidence — bailments.**

While the conductor was examining and stamping the tickets of plaintiff, a Pullman passenger, the porter carried into the car plaintiff's luggage, consisting of overcoat, portfolio and handbag, and when not to exceed two minutes later plaintiff went into the car he found only his overcoat and portfolio. In an action against the director-general of railroads, as agent, to recover for the loss of plaintiff's handbag through the alleged negligence of defendant's servant, it appeared that while the examination of plaintiff's tickets was in progress the porter, whom it did not appear was a servant of defendant, came out of the car empty handed and left after being tipped by plaintiff. *Held,* that it could not be assumed that the bag was left in the custody of defendant so as to make it liable as an insurer.

There being no basis in the evidence for a finding of negligence on the part of defendant a judgment in favor of plaintiff will be reversed and the complaint dismissed.

APPEAL by defendant Payne from judgment of the Municipal Court in the city of New York, borough of Manhattan, ninth district, in favor of plaintiff.

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Alexander & Green (H. G. Ogden, of counsel), for appellant.

Reed, Dougherty & Hoyt (J. Hampden Dougherty, Jr., and J. W. Schoenfeld, of counsel), for respondent.

GUY, J. In this action against director general of railroads, as agent, plaintiff, a Pullman passenger on the Baltimore and Ohio system, has recovered judgment for $200 for the loss of his handbag through the alleged negligence of defendant's servants.

Plaintiff testified that about nine o'clock on the night of November 28, 1919, he purchased transportation and Pullman tickets from Chicago to Akron, O.; that he left the waiting room of the depot, got a red cap porter to take over his bag, overcoat and portfolio; stopped to send a telegram, keeping his eye all the time on the porter; passed through the gate after the gateman punched his ticket, and proceeded along the train platform to the entrance to the Pullman car; that he then attempted to board the car but was stopped by the Pullman porter, who asked plaintiff to give his ticket to the Pullman conductor, who was standing alongside; that there was one Pullman porter on the car for which plaintiff purchased a ticket; that there were several other passengers waiting to be taken care of by the Pullman conductor, and plaintiff again attempted to go on the car, but was asked by the Pullman conductor to wait and surrender his ticket; that the red cap porter then proceeded into the car carrying plaintiff's luggage, consisting of overcoat, portfolio and handbag with him; that the Pullman conductor and the porter then examined plaintiff's tickets, and while they were making the examination the red cap porter came out of the car empty-handed, having been inside the car about

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a minute or a minute and a half; that when his tickets had been stamped by the Pullman conductor plaintiff went into the car, looked for his luggage, found only the overcoat and portfolio, but never found his bag. When the red cap porter came out of the car plaintiff tipped him, and the red cap porter then left. Not finding his bag plaintiff immediately notified the Pullman porter and the conductor and later the conductor of the train, and they all looked for the bag, but without result.

The facts do not warrant the assumption that the bag was left in the custody of the defendant so as to make defendant liable to plaintiff as an insurer. It does not appear that the red cap porter was the servant of the defendant; the facts indicate the contrary, and the trial judge apparently so decided. Nor is it satisfactorily established that the bag was left in the car. Assuming, however, that the red cap porter left the bag in the car, plaintiff to make out his case was required to show that his loss was sustained through defendant's negligence (*Goldstein* v. *Pullman Co.*, 220 N. Y. 549; *Hasbrouck* v. *New York Central & H. R. R. R. Co.*, 202 id. 363; *Holmes* v. *North German Lloyd S. S. Co.*, 184 id. 280), and a finding of negligence against the defendant must be based upon the proposition that during the period of about two minutes which elapsed from the entry of the red cap porter upon the car until plaintiff entered, it was the duty of defendant's servants to have kept their eyes upon plaintiff's property; and that therefore the mere loss of the bag under the circumstances testified to made out a *prima facie* case. The ruling imposing liability on the defendant is not so rigorous. *Goldstein* v. *Pullman Co., supra,* 552, 553. In the case cited the passenger's property disappeared during the night while the passengers were in their sleeping

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berths, at which time the sleeping car company is required to be vigilant so that the passenger may not lose his property through the company's inattention. In this case, however, we see no basis for a finding of negligence on the part of the defendant.

Respondent makes the point that twice plaintiff was prevented from following the red cap porter into the car, and that the loss would not have happened if the conductor had allowed him access at the same time with the porter. This is undoubtedly true; but plaintiff's passage was barred, in accordance with a reasonable regulation, to give defendant an opportunity to examine his tickets; his progress was not stopped for more than two minutes; and it could not have been reasonably anticipated that the slight delay to which he was subjected in common with other passengers would result in the loss of his property.

Judgment reversed, with thirty dollars costs, and complaint dismissed, with costs in the court below.

McCOOK, J., not sitting.

Judgment reversed, with thirty dollars costs.

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ELLEN A. O'CONNELL, Respondent, *v.* SUGAR PRODUCTS COMPANY, Appellant.

(Supreme Court, Appellate Term, First Department, January Term — Filed March, 1921.)

**Pleading — action for rent — sub-tenant — eviction — counterclaim.**

In an action for rent an answer pleading as a defense the eviction of defendant's sub-tenant, and, as a counterclaim, the damages resulting from such eviction, is on its face sufficient, and a judgment in favor of plaintiff and for the dismissal of the counterclaim will be reversed and a new trial granted.

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APPEAL by the defendant from a judgment of the Municipal Court of the city of New York, borough of Manhattan, fifth district, in favor of plaintiff, and dismissing defendant's counterclaim.

Seligsberg, Lewis & Strouse (Clarence M. Lewis and Jay Leo Rothschild, of counsel), for appellant.

Francis Colety, for respondent.

WAGNER, J. The trial judge correctly stated the existing rule to be that where a lessee sublets the demised premises for the unexpired term the transaction in effect, as far as the original lessor is concerned, is an assignment of the lease, and the original lessor can proceed against the so-called sub-lessee as assignee of the term. *Stewart* v. *Long Island R. R. Co.,* 102 N. Y. 601.

We incline to the view that the dissenting opinion of Judge Finch in the case cited enunciates a better rule governing assignment and subletting; but, as the dissenting judge himself says in his opinion, the old fiction which was deemed to have been disposed of by prior decisions of the Court of Appeals (*Collins* v. *Hasbrouck,* 56 N. Y. 157; *Ganson* v. *Tifft,* 71 id. 54; *Post* v. *Kearney,* 2 id. 394) "regains its old power and begins a new reign. The doctrine which I thought should be dethroned invites to its coronation. I must be permitted to decline."

However, the trial judge in this case overlooked the fact that we must consider between what parties the question arises. Here it arises between the original lessor and lessee, not, as in the *Stewart* case, between the original lessor and lessee's transferee. Under the doctrine of the *Stewart* case, between the original lessee and his lessee or transferee, even though the original lessee demises his whole term, if the parties

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intend a lease the relation of landlord and tenant as to all but strict reversionary rights will arise between them. 102 N. Y. 608. So that here, as it clearly appears from defendant's pleading that the intention of the defendant and its transferee, United Realty Alliance, Inc., was a subletting of the premises, under an instrument which reserved the payment of rent to the lessee in monthly installments exceeding by fifteen dollars the monthly rent specified in the original lease, the relation of landlord and tenant exists between the tenant and the United Realty Alliance, Inc., and the transaction as pleaded must be regarded as a subletting and the lessee in this action by the lessor to recover rent has a right to set up an eviction of its sub-tenant as a defense, and damages resulting from the eviction as a counterclaim. In short, the question in this action is what are the rights of the lessee as against the original lessor under the facts pleaded, not what are the rights of the original lessor and the United Realty Alliance, Inc., as between themselves.

It appearing from the answer that plaintiff has prevented defendant's tenant from taking possession of the premises, such an interference on the part of the original lessor would authorize a finding of eviction (*Burn* v. *Phelps*, 1 Stark. 94; *Lawrence* v. *French*, 25 Wend. 443; *Doran* v. *Chase*, 2 Wkly. Notes [Pa.], 609; 2 McAdam Landl. & Ten. [4th ed.] 1414, § 414), and the plea considered as a defense and counterclaim is on its face sufficient.

GUY and MCCOOK, JJ., concur.

Judgment reversed and new trial granted, with thirty dollars costs to appellant to abide event.

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INTERNATIONAL CHEESE COMPANY, Appellant, v. GAETANO GARRA and Another, Respondents.

(Supreme Court, Appellate Term, First Department, February Term — Filed March, 1921.)

**Sales — when property in goods delivered to a carrier for transmission passes to the buyer — contracts — evidence — damages — Personal Property Law, §§ 100, rule 4 (1, 2), 144(1).**

Under subdivisions 1 and 2 of rule 4 of section 100 of the Personal Property Law the property in goods delivered to a carrier for transmission passes to the buyer and the seller may sue for the purchase price unless subsequently he accepts a return of the goods.

In an action under section 144(1) of the Personal Property Law to recover the purchase price of goods sold because of the buyer's alleged wrongful neglect or refusal to pay according to the terms of the contract of sale, it appeared on cross examination of plaintiff's witnesses that at the time of defendant's refusal to accept, there was an available market for the goods which were still in the warehouse where they had been placed by plaintiff upon defendant's refusal to accept, though they had, at the time of the trial, depreciated in value. *Held,* that a dismissal of the complaint on the ground that plaintiff's sole remedy was an action for damages for defendant's non-acceptance of the goods, was error.

The erroneous exclusion of evidence which undoubtedly would have shown that plaintiff took back the goods only for the protection of the buyer calls for the reversal of a judgment dismissing the complaint and awarding costs to defendant, and the granting of a new trial.

APPEAL from a judgment of the City Court of the city of New York, entered November 8, 1920, dismissing the complaint and awarding the defendants $322.35 costs.

Smith & Tomlinson (Henry Willis Smith, of counsel), for appellant.

Guido J. Guidici, for respondents.

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LEHMAN, J. The complaint herein alleges in substance that plaintiff's assignors entered into a contract with the defendants whereby they agreed to "sell and deliver promptly by the Clyde Line to the defendants free on board at the city of Philadelphia, 25 cases of South American Percorino type cheese, the same as sample case sold and delivered to the defendants" previously. The defendants agreed to accept the said twenty-five cases if like sample, and pay therefor the sum of thirty-three cents per pound within thirty days from the time of such shipment. The complaint further alleges that plaintiff's assignors promptly shipped the cheese in accordance with the contract by the first vessel of the Clyde Line to sail from the city of Philadelphia to the city of New York subsequent to the making of the agreement; that the defendants thereafter and before the ship had arrived at its port of destination notified the plaintiff's assignors that they desired to cancel the agreement. The plaintiff's assignors promptly notified the defendants that they refused to accept such cancellation, but the defendants refused to accept such goods upon their arrival in New York, or to pay for them pursuant to the agreement but shipped them back to Philadelphia. The sellers immediately notified the defendants by letter of their refusal to accept the return of the goods, and that they left it to said defendants to take care of the same; that thereafter on failure of the defendants to do so the plaintiff, as assignee of all the interests and property of the sellers and for the protection of the defendants, stored the said goods in the city of Philadelphia for the account of the defendants as their agents; that the plaintiff by the said breach of said agreement on the part of the defendants has been damaged in the amount of the purchase price and cartage and storage upon the goods returned. At the trial the plaintiff offered evi-

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dence to sustain all the allegations of the complaint, but on cross-examination its witnesses showed that at the time of defendants' refusal to accept there was an available market for the goods in question, and further that the goods were still in the warehouse where they had been placed by the plaintiff upon the defendants' refusal to accept, though they had at the time of the trial deteriorated in value. Upon these facts appearing, the trial justice held that the plaintiff's sole remedy was an action for damages for the non-acceptance of the goods, and that if the plaintiff elected to proceed upon the theory that it was entitled to recover the purchase price he must dismiss the complaint. The plaintiff's attorney thereupon stated that he was proceeding under subdivision 1 of section 144 of the Sales Act, and the trial justice dismissed the complaint.

Subdivision 1 of section 144 of the Personal Property Law provides that where under a contract to sell or a sale the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods. There can be no doubt but that under subdivisions 1 and 2 of rule 4 of section 100 of the Personal Property Law the goods were unconditionally appropriated to the contract upon delivery to the carrier for the purpose of transmission to the buyer, and that upon such delivery the property passed to the buyer. It follows that the plaintiff has a right of action for the price of the goods, unless he has subsequently accepted the return of the goods, and thereby the property in the goods passed back to the seller. In the present case the evidence offered by the plaintiff, although erroneously excluded by the court, would



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undoubtedly show that the seller took back the goods only for the protection of the buyer and did not thereby divest the buyer of the property which had already passed upon the delivery to the carrier.

It follows that the judgment should be reversed and a new trial ordered, with costs to appellant to abide the event.

MULLAN and BURR, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

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DAVID SCHAEFER, Respondent, *v.* ADAM STEUERNAGEL, Appellant.

(Supreme Court, Appellate Term, First Department, February Term — Filed March, 1921.)

**Vendor and purchaser — contract for sale of real estate — when vendee cannot recover down payment — evidence — trial — Real Property Law, § 259.**

Under section 259 of the Real Property Law the vendee is not required to sign a contract for the sale of realty. (P. 548.)

Where a contract for the sale of realty was not signed by the vendee, he may not, in an action on the contract, to which the Statute of Frauds might be pleaded in bar, recover his down payment on the purchase price, unless the failure to perform the contract is ascribable to the vendor. (Pp. 548, 549.)

The trial court, upon the sole ground that the contract did not bind the plaintiff because he had not signed it, refused on objection of plaintiff's counsel to receive the contract in evidence, and for the same reason gave judgment in favor of plaintiff. All offers of testimony by defendant tending to

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show that he had acted in good faith and was at all material times ready, willing and able to complete the transaction, were excluded on the ground of immateriality. *Held,* that the view taken by the trial court was erroneous, and that as plaintiff had not made out a *prima facie* case the testimony excluded, though not necessary at the time offered, was very material, and the judgment must be reversed and a new trial ordered.

APPEAL by defendant from a judgment of the Municipal Court of the city of New York, borough of Bronx, second district, in favor of plaintiff, after trial by the court without a jury.

Peter Klein, for appellant.

Solomon Goodman, for respondent.

MULLAN, J. The parties were negotiating for the sale by defendant to plaintiff of a parcel of improved realty. They came, wholly orally, to an agreement, and plaintiff made a down payment of $200 on account of the purchase price. According to arrangement, they met on a later day at the office of defendant's attorney. Some slight readjustments of terms were agreed to, and then a new question arose, involving a chandelier valued by the parties at $15, and defendant agreed to plaintiff's demand as to that. A written contract was thereupon prepared, and it was signed by the defendant and his wife, but although it would seem — we purposely refrain from so deciding, however — that the minds of the parties met as to all essential particulars, the plaintiff refused to sign and then and thereafter refused to go forward with the matter. Whether the written instrument signed by the defendant correctly embodied the terms agreed upon does not appear, as the learned trial justice refused, upon an objection of plaintiff's counsel, to admit it in evidence, upon the stated ground

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that it did not bind the plaintiff for the reason that he did not sign it; and it was for the same reason, and that alone, that he gave judgment to plaintiff for the amount of his down payment.

The signature of a vendee of realty is not required to give validity to a contract for its sale; it is only the vendor who must sign. Real Prop. Law, § 259; *Quinto* v. *Alexander,* 123 App. Div. 1. But, as the record stands, the question cannot be decided, whether an enforceable contract was made by the signed writing on the part of the defendant and a reciprocal oral engagement on the part of the plaintiff. The plaintiff's theory upon the trial seems to have been that merely because he did not sign the agreement, he was entitled to recover back his earnest money. That, at least, was the sole consideration moving the trial justice to award judgment for the plaintiff. Plaintiff's counsel did, indeed, seem to think that it was open to him to show that the minds of the parties did not meet, but the testimony on this head was meagre, and of a merely casual and incidental character, and the matter was not seriously gone into, possibly because of the position consistently held by the learned trial justice that, regardless of any other consideration, the plaintiff must recover because he had not signed an agreement. The informal complaint was for "money had and received. Payment demanded and refused," and the answer was a general denial. Whatever plaintiff's original theory may have been, his theory during the trial seems to have been that upon proof of a failure on his part to sign, and upon that alone, he was entitled to his earnest money. That was a misconception. Assuming, as plaintiff did, that the agreement was unenforceable because of a noncompliance with the realty Statute of Frauds, that of itself did not entitle him to a return of his payment on

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account. A vendee who has paid money on account of a contract that cannot be enforced because of the Statute of Frauds, may recover back his down payment only if the failure to perform is ascribable to the vendor. Although he cannot successfully sue upon the contract, he is entitled to a return of the money he has paid, provided, however, that the failure of the transaction to ripen into a grant does not lie at his own door. *Abbott* v. *Draper,* 4 Den. 51; *Collier* v. *Coates,* 17 Barb. 471; *Graham* v. *Healy,* 154 App. Div. 76; *Fleischman* v. *Plock,* 19 Misc. Rep. 649; L. R. A. 1916 (D) 468 *et seq.* The principle to be drawn from the cases is that a vendee who has a contract for the sale of realty against which the Statute of Frauds may be set up as a bar, has been impliedly promised by the vendor that the latter will return to the vendee such moneys as have been paid by him on account in case the vendor is unwilling or unable to perform. It would seem to follow that the burden is upon the vendee of showing that the fault was not his, and that it was the vendor who was either unwilling or unable to perform. As was said by Bronson, Ch. J., in *Abbott* v. *Draper, supra:* "When the vendor refuses to go on with the contract, or has parted with his title so that he cannot perform, he is then in the wrong; and having himself put an end to the contract, there is no longer any consideration for the payments which have been made under it; and the law will imply a promise to restore the money. But how can the law imply a promise to refund the money so long as the vendor is not in default? The payment was a voluntary one, made with the full knowledge of all the facts. Every time a payment was made and received, the parties virtually said, although the law will not enforce this contract, we will go on and carry it into effect. The money is not received as a loan; but as a payment;

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and so long as the vendor is able and willing to perform the contract on his part, he holds the money as owner, and not as a debtor. The consideration upon which the money was paid has not failed; and there is nothing from which a promise to repay can be justly implied." And that the burden of putting the vendor in the wrong is upon the vendee in such a case as this, has been expressly held in other jurisdictions. *Laffey* v. *Kaufman,* 134 Cal. 391; *Lewis* v. *Whitnell,* 21 Ky. 190; *Cave* v. *Osborne,* 193 Mass. 482.

The vendor in the case at bar assumed a burden that was not properly his. He made numerous attempts to show that he had acted in good faith, and was at all material times ready, willing and able to carry the transaction through to completion, thus putting the plaintiff in the wrong, but the court ruled that the proofs were immaterial, and excluded them. They were very material in their nature, but they were unnecessary at that stage, for the plaintiff had failed to make his own essential *prima facie* proofs upon the subject. Had the case been tried upon the proper theory, we should feel called upon to dismiss the complaint, but as the erroneous view of the trial court may very possibly have misled the plaintiff's counsel, we have decided to send the case back for a new trial.

LEHMAN and BURR, JJ., concur.

Judgment reversed, new trial ordered, with thirty dollars costs to appellant to abide event.

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PUBLICKER COMMERCIAL ALCOHOL CO., Appellant, *v.* ROBERT M. ROBERTS, Respondent.

(Supreme Court, Appellate Term, First Department, February Term — Filed March, 1921.)

**Contracts — action for breach of a contract of shipment — foreign stock corporations — interstate commerce — Stock Corporation Law, § 15.**

In an action by a foreign stock corporation for breach of a contract of shipment from one state to another, no question under section 15 of the Stock Corporation Law of the state of New York is properly in the case.

*Sioux Remedy Co.* v. *Cope,* 235 U. S. 197, followed.

APPEAL by plaintiff from a judgment of the Municipal Court of the city of New York, borough of Manhattan, first district, dismissing the complaint at the close of the plaintiff's case.

Ludwig M. Wilson, for appellant.

David J. Gladstone, for respondent.

MULLAN, J. The plaintiff, a Pennsylvania stock corporation, sues for breach of a contract made by it with defendant for the sale by the plaintiff to the defendant, of alcohol, to be shipped from Pennsylvania to the defendant in New York. The complaint was dismissed at the close of plaintiff's case upon the ground that it then appeared that the contract was made in this state, that the plaintiff was doing business in this state, and that it had not procured the certificate authorizing it to do business in this state required by the provisions of section 15 of the General Corporation Law. The errors assigned by the plaintiff are that the proofs did not show that the plaintiff

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was doing business in this state, that the burden was improperly placed upon the plaintiff of showing that it was not doing business in this state, and that the court allowed defendant to make one of plaintiff's witnesses, who testified concerning the sale and delivery, the defendant's witness during plaintiff's case, to show that plaintiff was doing business within this state. While we may, without expressing any opinion as to the other points, avail, in the reversal we have agreed to, more particularly of the last named ground, there is a much more serious and fundamental error not referred to either upon the trial or in the briefs here. The transaction here in question was obviously one in interstate commerce, and the United States Supreme Court has held that a statute of South Dakota, substantially similar to sections 15 and 16 of our General Corporation Law, was, in so far as it was capable of restricting or interfering with foreign or interstate commerce, repugnant to the commerce clause of the federal constitution, and thus void; and that the requirement of a certificate and the designation of an agent did unduly restrict and interfere with transactions in foreign or interstate commerce. *Sioux Remedy Co.* v. *Cope,* 235 U. S. 197. There was, therefore, no question in relation to section 15 of the General Corporation Law properly in the case.

Judgment reversed, and new trial ordered, with thirty dollars costs to appellant to abide the event.

LEHMAN, J., concurring in reversal, but without passing upon the right of defendant to avail himself of section 16 of the General Corporation Law.

Judgment reversed and new trial ordered, with thirty dollars costs to appellant to abide event.

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H. & K. Costume Co., Inc., Respondent, v. Maison Bernard Importing Co., Inc., et al., Appellants.

(Supreme Court, Appellate Term, First Department, February Term — Filed March, 1921.)

**Negotiable instruments — promissory notes and trade acceptances — corporations — evidence.**

Where at the commencement of actions on promissory notes and trade acceptances, the corporation maker was in bankruptcy, the individual defendants, who were sought to be held as makers and indorsers, in support of their contention that their initials on the notes were neither intended nor understood by plaintiff to be other than part of the corporation signature, are entitled to show that by a resolution of the corporation adopted long prior to the making of the notes and acceptances in question, it had been determined that no signature of the corporation to any negotiable paper would be honored or paid unless the same was initialed by said individual defendants, and that the banks were so notified and as matter of fact had refused to pay notes made by the corporation to plaintiff because of the lack of such initials, and the exclusion of the evidence was reversible error for which judgments in favor of plaintiff will be reversed and new trials ordered.

Appeal by the defendants Hornick and Lunenfeld from judgments of the Municipal Court of the city of New York, borough of Manhattan, third district, in favor of plaintiff.

Zalkin & Cohen (Moses Cohen and David M. Pelley, of counsel), for appellants.

Isidor Cohn, for respondent.

Burr, J. Actions to recover on promissory notes and trade acceptances. These actions are six in num-

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ber. Each action is brought against the Maison Bernard Importing Corporation. In four of the actions Ottilie Hornick is joined as defendant, and in two of the actions Julius Lunenfeld is joined as defendant.

The actions in which Maison Bernard Company and Ottilie Hornick are joined are on promissory notes. The following is a specimen:

"$507.21 New York, *February* 24, 1920

"On April 6, 1920 we promise to pay to the order of H. & K. Costume Co.

"Five hundred and seven 21/100 Dollars.

"Payable at Bankers Trust Co. 5th Ave. & 42nd Street. Value received with int. at 6% p.a.

"No. ..... Due April 6. 1920.

"Maison Bernard Imp. Co.

"O. H. Bernard,

"*Pres.*'

The two actions in which Julius Lunenfeld is made co-defendant with the Bernard Importing Company are brought to recover in each case on a so-called "trade acceptance" reading as follows:

"No. — New York, *March* 15, 1920.

"To Maison Bernard Importing Co. 734 5th Ave.:

"On April 8, 1920, Pay to the order of Ourselves, Five hundred and ninety-two 31/100 Dollars ($592.31).

"*Trade Acceptance*

"The obligation of the acceptor hereof arises out of the purchase of goods from the drawer. The drawee may accept this bill payable at any bank, banker or trust company in the United States which he may designate.

"Accepted at New York on March 15, 1920.

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"Payable at New York Trust Co. Bank Location 5th Ave. & 57th St.

"Buyer's signature, Maison Bernard Importing Co.
"By Agent or Officer, Mrg. Bernard,
"*Pres.*
"J. L. H. & K. Costume Co. Inc.
"By Louis Kahn,
"*Pres.*"

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"No. — New York, *March* 15, 1920.

"To Maison Bernard Importing Co. 734 5th Ave. On March 26th, 1920. Pay to the order of Ourselves Six hundred and forty-seven 25/100 Dollars ($647.25)

"*Trade Acceptance*

"The obligation of the acceptor hereof arises out of the purchase of goods from the drawer. The drawee may accept this bill payable at any bank, banker or trust company in the United States which he may designate.
"Accepted at New York on March 15, 1920.
"Payable at New York Trust Co.
"Bank location 5th Ave. & 57th St.
"Buyer's signature, Maison Bernard Importing Co.
"By Agent or Officer
"Mrg. Bernard,
"*Pres.*
"J. L. H. & K. Costume Co. Inc.
"By Louis Kahn,
"*Pres.*"

The Maison Bernard Importing Company was not served in any of the cases, that company being at the time the actions were brought in bankruptcy.

The actions are brought against the defendant Hornick on the theory that she signed as a maker of the notes in suit,

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The actions are brought against the defendant Lunenfeld on the theory that he was an acceptor of the trade acceptances.

These defendants deny that their initials mean anything more or were intended to mean or to be anything more than part of the signature of the Maison Bernard Importing Corporation, of which they were officers at the time the papers were signed, and sought to show that plaintiff well knew this to be the fact and that such initials were required to be placed on any trade or negotiable paper of the Maison Bernard Importing Company before the same would be honored or paid by the bank on which the same were drawn.

Plaintiff's claim is that he refused to give the Maison Bernard Company any further credit and that to secure such further credit Lunenfeld and Hornick agreed to sign or indorse the paper of the Bernard Company, and that the initials on the papers in suit were intended to be the signatures of the defendants as makers or indorsers of said paper.

The defendants produced the minute book of the corporation to show that by a resolution adopted long prior to the making of the notes and acceptances in question, it had been determined that no signature of the corporation to any promissory note, draft or negotiable paper would be honored or paid unless the same was initialed by Hornick and Lunenfeld, and that the banks were so notified and had as a matter of fact refused to pay notes made by the corporation to the plaintiff because of the lack of such initials. Defendants sought to prove this in support of their contention that their initials were not intended to be nor were they understood by plaintiff to be anything other than part of the corporation signature, and not special signatures of the defendants whereby they made and intended to make themselves personally liable to plain-

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tiff on this paper. This evidence was ruled out by the trial judge, and in my opinion this was prejudicial error which requires that the judgment should be reversed.

LEHMAN and MULLAN, JJ., concur.

Judgments reversed and new trial ordered, with five dollars costs in each action to appellants to abide event.

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NATHAN GITZELTER, Respondent, *v.* HERMAN GROSSMAN, Appellant.

(Supreme Court, Appellate Term, First Department, February Term — Filed March, 1921.)

**Vendor and purchaser — when money paid as part of purchase price of real estate cannot be recovered — contracts.**

Where in an action to recover money paid as part of the purchase price for the sale of real estate, it appears that plaintiff, upon tender of the contract as agreed to, refused to accept, insisting that it should recite "subject to violations to date of taking title," to which defendant did not agree, the plaintiff is not entitled to recover, and a judgment in his favor will be reversed and the complaint dismissed.

APPEAL by defendant from judgment of the Municipal Court of the city of New York, borough of Manhattan, eighth district, in favor of the plaintiff.

Morris Kohn, for appellant.

Frank E. Silverman, for respondent.

BURR, J. The action was brought to recover the sum of $100 received from plaintiff by defendant as

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part of the purchase price for the sale of real estate by the defendant to the plaintiff.

On February 19, 1920, an agreement was entered into between plaintiff and defendant which reads as follows:

"I hereby acknowledge receipt of One Hundred Dollars ($100) as deposit from Nathan Gitzelter of Manhattan to be applied towards the purchase price of premises #245 East 104th Street. The purchase price is $8,062 & 50/100. Eight thousand and Sixty-two 50/100 Dollars. The premises are subject to $4,000 first mortgage at 5%. Four hundred ($400) to be paid by Nathan Gitzelter or his assigns on February 20, 1920, before 8 P. M., when contract for sale of this house No. 245 East 104th Street must be made, and unless this $400 is so paid and contract made, this deposit of $100. is forfeited and lost. I agree to take back a purchase money mortgage on this house for $2500 payable quarterly in installments of $150. each up to three years from date, and balance shall become due and payable. The interest on this mortgage will be 6% per annum. One thousand and sixty two 50/100 Dollars to be paid at the time of taking title.

"It is expressly understood and agreed that I have this house No. 245 East 104th street under contract at present, and will by this contract transfer our rights of the contract between N. Bernato and myself and Nathan Gruskin provided all of the above conditions are complied with, and in case I cannot deliver the deed all moneys paid me by Nathan Gitzelter or his assigns shall be returned to him.

"Dated Feb. 19/20. HERMAN GROSSMAN.

"The above has been read to me and I agreed to the terms. "NATHAN GITZELTER."

On February 20, 1920, when the contract for the sale of the house was to be made the respective parties met,

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and the defendant submitted to plaintiff a contract which recited that the premises were sold subject to violations to date of contract, to which plaintiff objected and stated that he did not want to purchase subject to violations to date of contract, but that seller should take care of all violations to date of title.

It is apparent that defendant in accepting the deposit of $100 for the purchase of the house only covenanted by the agreement to give a contract of sale in accordance with the terms he had made with the owner. The instant agreement is in no wise ambiguous. The defendant tendered a contract as agreed to, and the plaintiff refused to accept, insisting that the contract should recite "Subject to violations to date of taking title." As the defendant did not agree to so do the plaintiff was in no position to claim the additional provision. Respondent relies on the case of *Weinberg* v. *Greenberger*, 47 Misc. Rep. 117. The facts in that case bear no resemblance whatever to this case. In that case the money was paid as a deposit on account of a lease to be thereafter made, and it was left quite obscure for what purpose the deposit was given.

In the case at bar the agreement read that the $100 was received as a deposit from Gitzelter by the defendant, to be applied toward the purchase price of premises No. 245 East One Hundred and Fourth street.

In *Abramowitz* v. *Gray*, 50 Misc. Rep. 639, the court said: "In the present case, the money paid to defendant and now sued for is recited as having been paid on account of the purchase price for two lots, and the whole evidence shows that the payment was so made, and not merely as security for the making of some future contract."

The agreement dated February 19, 1920, recites that the money was paid as a deposit to be applied toward the purchase price of the premises.

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I am, therefore, of the opinion that the judgment should be reversed and the complaint dismissed, with costs.

Judgment reversed, with thirty dollars costs, and complaint dismissed with costs.

LEHMAN and MULLAN, JJ., concur.

Judgment reversed, with thirty dollars costs.

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UNITED STATES CAST IRON PIPE & FOUNDRY Co., Respondent, *v.* HUGH S. ROBERTS & Co., INC., Appellant.

(Supreme Court, Appellate Term, First Department, February Term — Filed March, 1921.)

**Service — substituted — Municipal Court of the city of New York — corporations — appeal.**

The Municipal Court of the city of New York has no power to make an order for substituted service of the summons on a corporation defendant.

An appeal lies from such an order and it and the order denying the motion to vacate the judgment entered on defendant's failure to appear will be reversed and the motion granted.

APPEAL from an order of the Municipal Court of the city of New York, borough of Manhattan, ninth district, denying defendant's motion to vacate a judgment entered on December 16, 1920, upon an order granting a motion for substituted service.

John C. vonGlahn, for appellant.

Fraser, Speir & Meyer (John L. Dunn, of counsel), for respondent.

*Per Curiam.* On December 1, 1920, the plaintiff obtained an order for the substituted service of the

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summons in this action on the defendant, upon proof that the defendant was a domestic corporation having its principal place of business in the borough of Manhattan, city of New York, and that proper and diligent effort has been made to serve the summons upon the defendant, and that none of the persons mentioned in subdivision 3 of section 431, Code of Civil Procedure, can be found. The defendant appealed from this order and did not enter any appearance after the summons was served upon it, in accordance with the terms of the order. Thereafter the plaintiff entered judgment against the defendant upon its failure to appear, and the defendant moved to set aside this judgment. This motion was denied, and the defendant also appeals from the order denying this motion, and the appeals from both orders are now before us.

The Municipal Court Code does not provide for any direct appeal from an order permitting a substitute for personal service of the summons, but it does provide for such an appeal from an order which the court had not the power to make, and in the present case the defendant contends that the Municipal Court has no power to make an order for substituted service upon a corporation. If that contention is correct, an appeal lies from the order of December first.

Section 21 of the Municipal Court Code provides that: "The summons may be served upon the defendant within the city of New York in like manner as though the summons issued out of the supreme court, except as otherwise provided in this act or in the rules, provided that it shall not be served by publication." Section 23 of the Municipal Court Code provides in part: "An order for the service of a summons upon a defendant residing within the city of New York may be made by the court, or a justice thereof in the dis-



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trict in which the action is brought, upon satisfactory proof, by the affidavit of a person not a party to the action, that proper and diligent effort has been made to serve the summons upon the defendant, and that the place of his sojourn cannot be found, or if he is within the city that he avoids service so that personal service cannot be made." This is the only section of the Municipal Court Code in which any power to make an order for substituted service is conferred upon the Municipal Court or a justice thereof, and there can be no question but that at the time when the Municipal Court Code was adopted, the legislature intended that no power to make orders for substituted service in any other case should be implied by virtue of any provision of the Code of Civil Procedure. It is true that section 23 also contains the provision: "The contents of the order, the method of service of the summons, the proof of service thereof, and the method of filing the order and the papers on which it was granted, shall be the same as though the summons were issued out of the supreme court, unless otherwise provided by the rules," but this provision by its express terms applies only to the practice and procedure where an order for substituted service has been made, and it does not by reasonable implication provide that the Municipal Court shall also have the same powers to make such an order as the Supreme Court possesses. See *Mitchell* v. *Schroeder*, 94 Misc. Rep. 270.

In the present case it is especially clear that the legislature did not intend to grant expressly to the Municipal Court power to make an order for substituted service in certain cases and at the same time to confer upon the Municipal Court the same power to make such orders as exists in the Supreme Court, because the only provision in the Code of Civil Pro-

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cedure which confers such power upon the Supreme Court or other court of record is section 435. That section could not apply in full force to the Municipal Court, because it provides for an order for service of a summons upon a defendant residing *within the state,* and of course the Municipal Court was never intended to have the power to make any order of substituted service upon a defendant residing within the state but not within the city, and it was necessary, if the legislature intended that the Municipal Court should have power to make orders for substituted service in regard to defendants residing in the city, that provision for this purpose should be made in the Municipal Court Code for no provision of the Code of Civil Procedure could be considered as applicable. The legislature did confer such power under section 23 of the Municipal Court Code, but its terms are not sufficient to include a domestic corporation, as a defendant residing within the city of New York within the meaning of that section. That section not only fails expressly to mention such a corporation, but the provisions as to the matters upon which satisfactory proof must be submitted can have no application to a domestic corporation, but evidently refer solely to natural persons. This construction becomes clear when we examine the history of this section. It is derived from section 435 of the Code of Civil Procedure as it existed until that section was amended by chapter 230 of the Laws of 1913. By that amendment the legislature indicated clearly its intent that the Supreme Court and other courts of record should have power to make orders for substituted service of summons upon a domestic corporation upon proof that none of the persons mentioned in subdivision 3 of section 431 can be found, and the legislature in making that amendment indicated that in its opinion such power did not

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exist under the language of the original section. When the legislature, however, enacted the Municipal Court Code in 1915, it saw fit to use practically the exact language of section 435 before such amendment. It cannot be presumed that the legislature overlooked the significance of its own amendment to section 435 of the Code of Civil Procedure, and it would, therefore, appear plain that under section 23 of the Municipal Court Code the legislature intended to confer upon the Municipal Court the power to make an order for substituted service upon a defendant residing within the city of New York only in such cases as the Supreme Court had power to make similar orders for service upon defendants residing within the state under section 435 of the Code of Civil Procedure as it existed prior to its amendment, and to withhold from the Municipal Court any additional power granted by such amendment.

It follows that the order for substituted service and the order denying the motion to vacate the judgment should be reversed, with ten dollars costs to appellant, motion to vacate the judgment granted, with ten dollars costs and judgment vacated.

Present: LEHMAN, MULLAN and BURR, JJ.

Order reversed, with ten dollars costs to appellant.

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ALFRED B. ADAMS and Another, Plaintiffs, *v.* MARCELLUS HARTLEY DODGE and Another, Defendants.

(Supreme Court, New York Special Term, March, 1921.)

**Bill of particulars — who entitled to — pleading — commissions — agency.**

A bill of particulars is unnecessary when the complaint is sufficiently specific.

Where the gist of a complaint is that on an unspecified date it was agreed that plaintiff's commission on a sale to the French government, alleged to have been negotiated by plaintiff on behalf of defendants, should be a certain fixed proportion of the purchase price, the plaintiff may properly be required to give a bill of particulars in regard to immaterial matters which by pleading he has assumed or admitted are material.

The gist of the defense, so far as material, was that one of the defendants was merely acting as agent of the other in the transaction. *Held,* that an apparent admission of an allegation of the complaint, that it was agreed between plaintiff and defendants, by an allegation of the answer that it was finally agreed with plaintiff, by the defendant for whom the other defendant was acting, that plaintiff's commission should be, etc., was really a denial of said allegation of the complaint, it being admitted only that an agreement was made with but one of the defendants.

The answer containing nothing to indicate that the date of the agreement admitted by the answer was the same as that set up in the complaint, defendants were entitled to a bill of particulars to the end that they may be apprised of the date when plaintiff claims both defendants entered into the agreement, and also of all other appropriate particulars thereof sought by defendants.

MOTION for a bill of particulars.

Hornblower, Miller & Garrison (Geo. S. Hornblower, of counsel), for plaintiffs.

Shearman & Sterling (Chauncey B. Garver, of counsel), for defendants.

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BIJUR, J. This is a motion for a bill of particulars.

Plaintiff Adams sues for his commissions on a sale to the French government alleged to have been negotiated by him on behalf of defendants. The complaint alleges that the plaintiff Adams "arrived in New York on or about March 22, 1915, and immediately went to the defendants' offices, where he conferred with them" concerning the proposed order "* * * and after a further conference a compromise was effected, and it was agreed between the plaintiff Adams and the defendant that he should reopen negotiations * * * and that his commission thereon should be reduced," etc.

The answer in paragraph 5 "denies each and every allegation contained in Article VI thereof, except that the plaintiff Adams arrived in New York on or about March 22, 1915, and went to the offices of the defendant Dodge, where he conferred with the defendants relative to the situation and to renewing negotiations * * *. Dodge requested plaintiff Adams to agree to reduce his commission * * * and * * * it was finally agreed with him by the defendant Dodge that his commission should be * * *."

The gist of the defense (so far as material here) is that defendant Pryor was merely acting as the agent of defendant Dodge. Defendants now ask for particulars:

(1) As to the exact date when Adams conferred with defendants and whether that conference was with defendant Dodge or defendant Pryor or both, etc.

(2) The exact date upon which occurred the further conference when the "compromise" agreement was effected.

(3) Whether the "compromise" agreement was made orally or in writing, etc., and also the precise terms under which the plaintiff Adams' commissions became payable in installments.

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(4) Whether it was made with defendant Dodge or defendant Pryor or both, etc.

The difficulty which has arisen in this case is due to the disregard by the draftsman of the complaint of an important rule of pleading, *i. e.*, that only *material* facts be set out. Section 481 of the Code of Civil Procedure provides that: "The complaint must contain (2) A plain and concise statement of *the facts constituting each cause of action* without unnecessary repetition." The method of pleading prescribed by the Code — as distinguished from the former practice — was designated to require the allegation of facts rather than the merely formal and unilluminative "common counts." *Bush* v. *Prosser*, 11 N. Y. 347, 352; *Conaughty* v. *Nichols*, 42 id. 83.

On the other hand, since section 500 of the Code of Civil Procedure provides that: "The answer of the defendant must contain: A general or specific denial of each *material* allegation of the complaint controverted by the defendant," it was not intended that the complaint should set out immaterial matter. Indeed, such matter need not be denied, and failure to deny it does not imply its admission. *Linton* v. *Unexcelled Fireworks Co.*, 124 N. Y. 533; *Fry* v. *Bennett*, 5 Sand. 54; *Connoss* v. *Meir*, 2 E. D. Smith, 314; *Sands* v. *St. John*, 36 Barb. 24; *Brown* v. *Cody*, 23 App. Div. 210.

Judged by these rules, it would seem to have been wholly unnecessary for plaintiff to have alleged that he arrived in New York on any particular date and immediately or otherwise went to defendants' offices and conferred with them. The gist of his complaint is, as alleged in the same paragraph, that on some date, not specified, "it was agreed * * * that plaintiff's commission should be" a certain fixed proportion of the price. Plaintiff's cause of action rests upon an alleged breach of the agreement then effected

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to pay him a fixed commission. Nothing further need have been alleged, and there was no more reason to refer to plaintiff's arrival in New York on March twenty-second and the conference then held than there was to relate other circumstances of his previous acquaintance with the defendants. Defendants might quite properly have disregarded these unnecessary statements, but in response to plaintiff's allegation they have admitted them. Plaintiff, however, may properly be required to give a bill of particulars in regard thereto, because by his own pleading he had assumed or admitted that they are material. *Cunard* v. *Franck-lyn*, 111 N. Y. 511. Since, however, in any event, the precise date of the first conference is specified by the complaint, and it is therein stated to have occurred with the defendants, which defendants admit, it is unnecessary for plaintiff to furnish a bill of particulars in that respect.

The function of a bill of particulars has been frequently described as of a two-fold nature, namely, to "amplify the pleadings" (*Dwight* v. *Germania Life Ins. Co.*, 84 N. Y. 493, 506; *Starkweather* v. *Kittle*, 17 Wend. 20), and to "limit generalities" (*Gee* v. *Chase Mfg. Co.*, 12 Hun, 630). It is therefore plainly unnecessary where the complaint is respectively sufficiently broad or specific. In such a case the pleading needs no amplification, and there is no generality to be limited. *Fullerton* v. *Gaylord*, 30 N. Y. Super. Ct. 551, 557; *Ehrgott* v. *City of New York*, 96 N. Y. 264, 277. The particular object of a bill of particulars is well defined in *Slingerland* v. *Corwin*, 105 App. Div. 310, 311. "Its purpose is only to amplify the pleading and indicate with more particularity than is ordinarily required in a formal plea the *nature* of the claim made *in order that surprise upon the trial may be avoided* and the issues more intelligently met." *Taylor* v. *Security*

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*Mutual Life Ins. Co.*, 73 App. Div. 318. The avoidance of surprise at the trial is also adverted to in the *Dwight Case* (*supra*) at page 503: "It (*i. e.*, the ordering of a bill of particulars) is a power incident to the general authority of the court in the administration of justice. It is the same power, in kind, that courts have to grant a new trial on the ground of surprise. The latter is remedial and curative. The former (namely, bill of particulars) is preventative. But both have the same purpose, to reach exact justice between the parties, by learning just what is the truth, and to learn what is the truth by giving to each party all reasonable opportunity to produce his own proofs, and to meet and sift those of his adversary."

Judged by these standards, it seems to me to be clear that the particulars asked for by defendants in respect of the second sentence of paragraph 6 of the complaint should be furnished. That sentence is the only one which contains the allegation of the actual agreement upon which plaintiffs sue. The complaint alleges that "it was agreed between plaintiff Adams and the *defendants.*" The answer says: "It was finally agreed with him (plaintiff Adams) by the defendant *Dodge* that his commission should be," etc. It will be observed that in substance the apparent admission of the answer is in reality a denial of the allegation of the complaint that an agreement was entered into between plaintiff and the *defendants*, it being admitted only that an agreement was made between plaintiff and defendant Dodge. There is nothing in the answer to indicate that the date of the "admitted" agreement between plaintiff and defendant Dodge is the same as that referred to in the plaintiff's allegation of an agreement between plaintiff Adams and both defendants. Since this is the very essence of the cause of action, defendants are entitled

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to the particulars of the plaintiffs' "*claim*" in that regard. *Dwight* v. *Germania Life Ins. Co., supra,* 503; Code Civ. Pro. § 531, last sentence. Plaintiffs cannot successfully urge that the defendants have sufficient knowledge to enable them to guess at the particular occurrence indicated. Defendants are entitled to know, and not to be relegated to conjecture, concerning what is actually claimed by the plaintiffs in that regard. *Dwyer* v. *Slattery,* 118 App. Div. 345; *Waller* v. *Degnon Cont. Co.,* 120 id. 389. Defendants should therefore be apprised of the date when plaintiffs claim that *both* defendants entered into the agreement and also of all the appropriate particulars of such agreement as requested in the second and third items of the demand for a bill of particulars.

The terms upon which plaintiffs' commissions are claimed to have become payable are alleged in paragraph 7 of the complaint by reference to a contract between the defendants and the French government; this, in turn, is apparently sufficiently specified in paragraph 7 of the complaint. So much, therefore, of the third item in the request may be omitted. The fourth item, covering other details of the alleged ultimate agreement, should be furnished.

Although at first blush the attitude of the defendants may appear captious and hypercritical, an analysis of their contentions has convinced me of their soundness. Close thinking and clear expression are conducive to accuracy and expedition on the trial. In most cases it becomes necessary at some stage of the litigation to define the controversy clearly. It is better, as indicated in the cases hereinabove cited, to prevent surprise in advance by a clear definition of the facts controverted rather than to await the trial and there incur the risk of confusion and delay. We have dispensed with mere formalism; it still remains

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true, however, as said by Earl, J., in *Southwick* v. *First Nat. Bank of Memphis*, 84 N. Y. 420, 429, that: "Pleadings and a *distinct issue* are essential in every system of jurisprudence, and there can be no orderly administration of justice without them."

My conclusion, therefore, is that the first item is unnecessary, but that the second, the first half of the third, and the entire fourth items are matters upon which the defendant is entitled to the bill sought on this motion.

Ordered accordingly.

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JOSEPH SKOLNY and LEO SKOLNY, Copartners Doing Business under the Firm Name and Style of Jos. SKOLNY & Co., Plaintiffs, *v.* SIDNEY HILLMAN, Individually and as General President of the Amalgamated Clothing Workers of America, an Unincorporated Association, et al., Defendants.

(Supreme Court, New York Special Term, March, 1921.)

**Membership associations — action against — Code Civ. Pro. §§ 1919, 1923 — sufficiency of complaint — injunction pendente lite granted — labor dispute.**

By section 1919 of the Code of Civil Procedure a simple method is provided by permitting an action to be maintained against either the president or treasurer of an unincorporated membership association, to bring the entire membership before the court, and if that simple mode is not preferred, section 1923 of the Code of Civil Procedure preserves the common law right of suing all the members. (P. 576.)

While the practice of suing one member, both individually and as president, and another member individually and as assistant general secretary, cannot be sanctioned, the complaint will not be condemned if in fact a cause of action was alleged against the president. (Id.)

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Where the complaint, in an action brought against the president and assistant general secretary of the "Amalgamated Clothing Workers of America," an unincorporated membership association having an approximate membership of 175,000 workers in the clothing trades, alleges that the defendants combined to do the injurious acts arising out of labor troubles of which plaintiff, a clothing manufacturer, complains, such allegations mean and charge all the members and they are all liable. (Pp. 577, 578.)

The complaint and affidavits on motion for an injunction *pendente lite* considered and defendant's motion for judgment on the pleadings denied and the injunction granted.

*People* v. *Melvin*, 1 Yates Sel. Cas. 81, followed. (P. 580.)

ACTION for an injunction.

Gordon, Tally & Gordon (Harry A. Gordon, of counsel), for plaintiffs.

Lowenthal & Szold (Samuel Seabury, of counsel), for defendants.

ERLANGER, J. Plaintiff brought this action against Sidney Hillman, individually and as general president of the Amalgamated Clothing Workers of America, an unincorporated association, and against Jacob S. Potofsky, individually and as assistant general secretary of the said association. Many other parties are joined as defendants in the summons and caption of the complaint, but the two persons mentioned alone were served and the action is being prosecuted solely against them up to this time. A brief synopsis of the material facts alleged in the complaint follows: Plaintiffs are manufacturers of men's and boys' clothing; their principal place of business is in the borough of Manhattan; they operate factories in both of the boroughs of Manhattan and Brooklyn; their annual output is approximately $3,000,000; that the Amalgamated Clothing Workers of America is an unincorpo-

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rated membership association with an approximate membership of 175,000 and is an association of workers in the clothing trades in, among other cities, the city of New York and has its principal office in the borough of Manhattan; that said association of workers according to its constitution is governed, managed and controlled by a general executive board consisting of eleven members, of whom three are the general president, general secretary, and financial secretary, and eight are the general executive board members; that by its constitution it was at all the times hereinafter mentioned, and still is provided that the general executive board shall have the right, power and authority to call and authorize strikes and to direct and declare boycotts; that at the times hereafter mentioned the individual members of the Amalgamated Clothing Workers of America were and still are members of certain local unions of said defendant, authorized, created and constituted by said defendant and composed of workers in certain branches of the clothing industry in the United States and particularly in the city of New York; that in the city of New York and for the purpose of a more complete control and management of the business of said Amalgamated Clothing Workers it has created and authorized the formation of a joint board; that the various local unions in the city of New York elect and select representatives upon said board in said city and that said board has, subject to the review and control by the general executive board of the Amalgamated Clothing Workers, jurisdiction of all matters and things affecting the defendant Amalgamated Clothing Workers and of the members thereof employed and working in the city of New York, etc. On January 27, 1921, plaintiff entered into contracts with certain persons who agreed to work for them in certain capacities from

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week to week and such employment was upon the express understanding that such employees had ceased to be affiliated with the defendant Amalgamated Clothing Workers of America (if they were so affiliated) or with any other union, and that they would not join the said association or any other union while in plaintiff's employ nor make any effort to bring about the unionizing of plaintiff's employees. That under the terms of this agreement which was in writing, the various persons signatory to the same entered upon their employment, of which fact the association had due notice. That in violation of the contract rights of plaintiff and contrary to the terms of said contracts of employment, and without any complaint, grievance or dispute among said employees and with the intent and purpose solely of preventing the plaintiffs from doing any business and of ruining the plaintiffs' said business and bringing about disorder therein and chaos into the community, the members of the Amalgamated Clothing Workers of America prior to the commencement of this action unlawfully and maliciously agreed together, confederated and combined and formed themselves into a conspiracy, the purpose of which they are proceeding to carry out, to cause plaintiffs' factory to be shut down, their plant to remain idle, their contracts to be broken and unfulfilled until such time as plaintiffs shall submit to the demand of said Amalgamated Workers to unionize their factory and by employing workers who shall be members of and subject to the orders of said association and in furtherance of said conspiracy and unlawful combination are wrongfully and unlawfully instigating plaintiffs' employees to cease working for plaintiffs and to join said association in the accomplishment of the aforesaid purposes. That the members of said association have caused, sanctioned and directed and are

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conducting a strike against plaintiffs and their factory and the members of said association have been and still are wrongfully and unlawfully instigating persons to become engaged in the practice of picketing plaintiff's factory and to congregate about the premises coercing, threatening, assaulting, intimidating, halting and turning aside against their will those who would go to and from plaintiffs' place of business and those who are working under the contracts referred to and those who would seek work with plaintiffs and have been and are enticing employees under contract with plaintiffs to desert their employment and to breach their contracts and join said association and hampering and hindering the free dispatch of plaintiffs' business. That plaintiffs have invested a large amount of money in their business, which is being jeopardized and that unless defendants are restrained the defendants will continue in the aforesaid acts to plaintiffs' irreparable injury and damage. That plaintiffs have no adequate remedy at law. An injunction is prayed for that the acts of the defendants be decreed to be a common law conspiracy and in unreasonable restraint of trade and a conspiracy against the rights of non-union workers. That the acts mentioned in the prayer of the complaint be restrained, etc. The two defendants served by their answers specifically deny the acts charged against them and the Amalgamated Clothing Workers. They also move for judgment on the pleadings. The plainiffs move for an injunction *pendente lite*. These will be considered in their order. Two objections are urged which it is contended are fatal to the plaintiffs' cause. The first is directed to the violation of the section of the Code which permits actions to be brought against unincorporated associations, and under the second, it is claimed that the complaint is

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insufficient because it fails to allege facts showing liability of all the membership, consisting of 175,000, of the Amalgamated Clothing Workers. It is argued under the first that an unincorporated association is not a legal entity and cannot be sued apart from its membership; that all rights against it must be enforced against all its members, and similarly all rights in its favor must be sought by all. 5 C. J. 1365, § 102. To obviate the difficulties in that regard, section 1919 of the Code was enacted, and by that section a simple method is provided by permitting an action to be maintained against either the president or treasurer to bring the entire membership before the court. Both cannot be sued, the disjunctive *or* particularly excludes that idea — a choice is given to select one of the two or if that simple mode is not preferred, section 1923 of the Code preserves the common-law right of suing all. The plaintiffs did not proceed in strict conformity to section 1919 of the Code. They sued Hillman individually as well as president — and Potofsky individually and as assistant general secretary, and then as shown other officers and agents of the association were attempted to be joined. This procedure is not sanctioned. *Schmidt* v. *Gunther,* 5 Daly, 452–453. But I do not think because of the practice followed that the complaint should be condemned if in fact a cause of action is alleged against the president. The same question arose in *Rourke* v. *Elk Drug Co.,* 75 App. Div. 145, and it was there held that such procedure was not fatal. At the appropriate time application can be made to the Special Term to strike from the summons and complaint the unnecessary parties and ample authority is to be found for such action. *Boyd* v. *United States Mortgage & Trust Co.,* 187 N. Y. 262; *Johnson* v. *Phœnix Bridge Co.,* 197 id. 316; *Helling* v. *Boss,* 121

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N. Y. Supp. 1013. We come now to the second ground which attacks the legal sufficiency of the complaint. Many cases are cited in support of the point thus urged. It is argued that the test of sufficiency to be applied is, does the complaint allege that all of the 175,000 members are liable either jointly or severally for the acts charged or jointly liable because of the acts of agents duly constituted and appointed? Counsel for defendant asserts it does not and it is also maintained that not only must liability of all be alleged but proof thereof is a *sine qui non* for success upon the trial. In other words, unless it is alleged and can be established upon the trial that this large number of members are each individually liable because of what each did, authorized or ratified, no cause of action exists. In my opinion the 15th paragraph of the complaint covers the point, and *Hitchman Coal & Coke Co.* v. *Mitchell* (245 U. S. 229) decided by the Supreme Court of the United States is decisive on that detail. The court, through Mr. Justice Pitney, there said: "When any number of persons associate themselves together in the prosecution of a common plan or enterprise lawful or unlawful, from the very act of association *there arises a kind of partnership, each member being constituted the agent of all,* so that the act or declaration of one in furtherance of the common object is the act of all and is admissible as primary and original evidence against all." (Italics mine.) This pronouncement of the court when read in the light of the charges made in the complaint justifies the form in which the wrong is alleged and renders the complaint immune from attack for the grounds insisted upon. Pleadings are to be liberally construed. The tendency of the courts is to get away from the technical rules which have fettered justice. The allegations of the wrongs are



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alleged in general terms. When it is charged that the defendants combined to do the acts of injury complained of, it means all and charges all; and all are liable within the authorities. In the last analysis do the papers show grounds for the injunction? At one time denial of the equities of the bill defeated the application for such relief. That time is gone. Acts which amount to a crime are not usually admitted. Courts look into the merits of the motion. It is now the rule that only a *prima facie* case need be made, and if the court can spell from the papers that that has been shown, it has been held to be enough. *Sultan* v. *Star Co., Inc.*, 106 Misc. Rep. 43; *Lawrence* v. *Lawrence*, 172 N. Y. Supp. 146. The plaintiffs claim that they have established an open shop; that employment in their factories depends upon an agreement in writing from week to week with their employees; that they have ceased to be affiliated with any union; that they will not join any union while so employed, and that they will abstain from all efforts to bring about the unionizing of plaintiffs' employees. Such are the conditions of the employment and those conditions the signatories to the agreement have obligated themselves voluntarily to abide by. This form of agreement has been upheld in *Hitchman Coal & Coke Co.* v. *Mitchell, supra.* The affidavits presented by plaintiffs support the charges alleged in the complaint. The defendants deny the charges, not all, but most of them. Some denials, those referring to the charge of assault, are made by affiants who were not present and could have no knowledge on the subject. But it is admitted by one of the pickets that "whenever they think that some one is a prospective employee of the firm they go to him quietly and merely inform such person that there is a lock out." It is quite impossible to quote from all the affidavits submitted *pro* and *con.* Plain-

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tiffs claim that their troubles resulted from a strike of their employees. The defendants assert there was a lock out against them and what they are doing is entirely within their rights. They attack the form of plaintiffs' contract and insist they are invalid because no definite time is fixed and the employee can be discharged at any moment. That they are invalid for lack of consideration; that there is no evidence of an intent to procure a breach of them; that their picketing is lawful; that they have a right to combine to strike and to persuade others to join them to improve their economic condition; that they had no notice of plaintiffs' contract, etc. It is clearly established that picketing is lawful — that a man may work or not as he shall choose; that he may strike with others and peaceably seek others to join. But it is equally well settled that a worker may work wheresoever it pleases him; that he may labor and provide for himself and family without being subjected to the danger of assault or threat of bodily harm; that he cannot be compelled to join a union if he is not disposed so to do; that employees may not be enticed from their employment by threats or otherwise; that the right to live and let live is a God given right to be observed by all, and that all rights, whether of great or lesser magnitude, will be protected by the courts which the people have created for the common protection of all. Intimidation does not necessarily carry with it an act of violence. The application of the term "scab," the use of insulting epithets, the fear of going back and forth from the workshop, the visitations at the homes of workers and threatening them if they did not quit working for plaintiffs, that the union would see to it if they won the strike that they would never again get employment in the clothing trade and the like has been found effective. It is

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a silent weapon but carries with it a menacing attitude. *Michaels* v. *Hillman*, 112 Misc. Rep. 395. Parties placed in the position of plaintiffs and their workmen are not obliged to resort to criminal proceedings for protection against unlawful combinations or conspiracies. Under modern decisions courts of equity are more apt to restore order and confidence than doubtful results in a criminal court. *Heitkamper* v. *Hoffmann*, 99 Misc. Rep. 543–546. The differences that exist between capital and labor are not of recent origin. Dug from among the *causes celebres* of an almost forgotten age the *Journeymen Cordwainers* case is a living example. The case is entitled *People of the State of New York* v. *Melvin*, 1 Yates Sel. Cas. 81. In that case a number of workmen were indicted in 1809 for conspiracy. The first count of the indictment states that the defendants being workmen and journeymen in the art, mystery and manual occupation of cordwainers, on the 18th of October, 1809, etc., "unlawfully, perniciously and deceitfully designing and intending to form and unite themselves into an unlawful club and combination, and to make and ordain unlawful by-laws, rules and orders among themselves, and thereby to govern themselves and other workmen in the said art, and unlawfully and unjustly to extort great sums of money by means thereof, on the day and year aforesaid, with force and arms, at etc., together with divers other workmen and journeymen in the same art, etc., * * * did unlawfully assemble and meet together, and being so, etc., did then and there, unjustly and corruptly conspire, combine, and confederate and agree together, that none of them, the said conspirators, after the said 18th October, would work for any master or person whatsoever, in the said art, mystery and occupation, who should employ any workmen or journey-

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men, or other person in the said art, not being a member of said club or combination, after notice given, etc., to discharge such workmen, etc., from the employ of such master," etc. Article VIII of their constitution reads as follows: "No member of this Society shall work for an employer, that has any journeymen cordwainer, or his apprentice in his employment that do not belong to this Society, unless the journeymen come and join the same; and should any member work on the seat with any person or persons that has not joined this Society, and do not report the same to the President, the first meeting night after it comes to his knowledge, shall pay a fine of $1.00." Article IX, "If any employer should reduce his journeymen's wages at any time, or should the said journeymen find himself otherwise aggrieved, by reporting the same to the Committee at their next meeting, they shall lay the case before the Society who shall determine on what measures to take to redress the same." Article XVII fixes the wage of the journeymen in the city of New York. The case was sent to the jury who found the defendants guilty and thereupon they were fined one dollar each with costs. Many of the acts in the cited case bear a strong resemblance to those complained of in the instant case, and were treated and punished as a common law conspiracy. Though infrequently cited, so far as I have been able to discover, it is still authority and has been given approval in *Davis* v. *Zimmerman,* 91 Hun, 492, and in *New York Central Iron Works Co.* v. *Brennan,* 105 N. Y. Supp. 865–869. My conclusion is that the motion for judgment on the pleadings must be denied, with ten dollars costs. That under all the authorities upon the facts, the motion for an injunction *pendente lite* should be granted.

Ordered accordingly.

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## Matter of the Petition of BETH ISRAEL OF BROWNSVILLE, a Religious Corporation, for Leave to Mortgage Real Estate.

(Supreme Court, Kings Special Term, March, 1921.)

**Religious corporations — when application for leave to mortgage real property must be on consent of majority of members.**

The trustees of a religious corporation having a congregational form of government have no power to initiate proceedings to sell or mortgage the real property of the corporation without the consent of the members.

Under the present Religious Corporations Law such consent of the members given by a majority vote at a meeting, or in some manner in accordance with legally adopted by-laws, is requisite to authorize the trustees to make such an application.

The application herein making no reference to any such by-law now in force will be denied with leave to renew on further papers.

APPLICATION by a religious corporation to mortgage its real property.

William E. Smith, for petitioner.

No appearance in opposition.

BENEDICT, J. This is an application to authorize the petitioner, a religious corporation incorporated under article X of the Religious Corporations Law, to mortgage its real property. It does not appear that the members of the congregation have authorized the mortgage. The trustees of a religious corporation having a congregational form of government have not, in my opinion, power to initiate proceedings to sell or mortgage the real property of the corporation without the consent of the members. The rule

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seems formerly to have been otherwise. *Madison Ave. Baptist Church* v. *Baptist Church in Oliver St.*, 46 N. Y. 131. But the statute in force when the conveyance under consideration in the case cited was made differed materially from the statute now applicable. The powers of trustees of religious corporations incorporated under chapter 60 of the Revised Laws of 1813, were defined in section 4 of said act as follows:

"That the trustees of every church, congregation or society, herein above mentioned, and their successors, shall respectively have and use a common seal, and may renew and alter the same at their pleasure, and are hereby authorized and empowered to take into their possession and custody all the temporalities belonging to such church, congregation or society, whether the same consist of real or personal estate, and whether the same shall have been given, granted, or devised, directly to such church, congregation or society, or to any other person for their use; and also by their corporate name or title, to sue and be sued in all courts of law or equity, and to recover, hold and enjoy all the debts, demands, rights and privileges, and all churches, meeting-houses, parsonages and burying places, with the appurtenances, and all estates belonging to such church, congregation or society, in whatsoever manner the same may have been acquired, or in whose name soever the same may be held, as fully and amply as if the right or title thereto had originally been vested in the said trustees; and also to purchase and hold other real and personal estate, and to demise, lease and improve the same, for the use of such church, congregation or society, or other pious uses, so as the whole real and personal estate of any such church, congregation or society * * * shall not exceed the annual value

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or income of three thousand dollars; * * * and also to repair and alter their churches or meeting houses, and to erect others if necessary, and to erect dwelling houses for the use of their ministers, and school houses and other buildings for the use of such church, congregation or society; and such trustees shall also have power to make rules and orders for managing the temporal affairs of such church, congregation or society, and to dispose of all monies belonging thereto, and to regulate and order * * * all other matters relating to the temporal concerns and revenues of such church, congregation or society."

Section 3 of the same act, providing for the incorporation of churches other than Protestant Episcopal and Reformed Protestant Dutch churches authorized the male members to elect trustees "to take the charge of the estate and property belonging thereto, and to transact all affairs relative to the temporalities thereof."

The power to sell the real property of such a corporation is not included in the above recital of powers, because that was provided for in section 11 of the same act, authorizing the chancellor of the state, on the application of any religious corporation, if he shall deem it proper, to make an order for the sale of any of its real estate.

Under this statute it was held, in the case above cited, that the trustees, who were constituted "the managing officers and agents of the corporation, in respect to all its temporalities," had power to initiate the proceedings before the chancellor for leave to sell its real property, without the consent of the members.

The present statute is materially different from the act of 1813. The powers of trustees of such relig-

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ious corporations as the petitioner are prescribed by section 5 of the Religious Corporations Law as follows:

"The trustees of every religious corporation shall have the custody and control of all the temporalities and property, real and personal, belonging to the corporation and of the revenues therefrom, and shall administer the same in accordance with the discipline, rules and usages of the corporation and of the ecclesiastical governing body, if any, to which the corporation is subject, and with the provisions of law relating thereto, for the support and maintenance of the corporation, or, providing the members of the corporation at a meeting thereof shall so authorize, of some religious, charitable, benevolent or educational object conducted by said corporation or in connection with it, or with the denomination, if any, with which it is connected; and they shall not use such property or revenues for any other purpose or divert the same from such uses. By-laws may be adopted or amended, by a two-thirds vote of the qualified voters present and voting at the meeting for incorporation or at any subsequent meeting, after written notice, embodying such by-laws or amendment, has been openly given at a previous meeting, and also in the notices of the meeting at which such proposed by-laws or amendment is to be acted upon. By-laws thus adopted or amended shall control the action of the trustees * * *."

The difference between these provisions and those above quoted from the act of 1813 is obvious, and under the present law the consent of the members, given by a majority vote at a meeting, or in some manner in accordance with legally adopted by-laws, is, in my opinion, requisite to authorize the trustees of a religious corporation having a congregational

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form of government to apply for leave to sell or mortgage its real property. It may be that the applicant corporation in the present case has adopted a by-law which dispenses with any requirement that the action of the trustees in respect of the sale or mortgage of the church property be approved or authorized by the members. If there be any such by-law now in force, it is not referred to in the petition.

Application denied with leave to renew on further papers.

Application denied.

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GUSTAV FALK, Plaintiff, *v.* LEWIS K. THURLOW, Defendant.

(Supreme Court, Kings Trial Term, March, 1921.)

**Ships and shipping — injury to seaman upon the high seas — obligation of ship for care and maintenance of disabled seaman — jurisdiction.**

The obligation of a ship to care for a seaman if he becomes ill or is injured while in service continues for a reasonable period after the termination of his employment.

The seaman's maritime right to maintenance and care for a reasonable time after his employment ceased may be enforced in the state courts.

Where the seaman met with an accident incidental to his service while the ship was on the high seas and only a short distance from some of the large ports of South America, a cause of action alleged in the complaint for defendant's failure to furnish plaintiff with reasonably good medical attention turned on the question whether plaintiff requested to be landed at one of those ports, was decided in his favor though he was brought to New York. A motion for a new trial will be granted unless plaintiff consents to the reduction of a verdict of $1,200 to $500, in which event the motion will be denied.

MOTION for a new trial.

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Silas B. Axtell (Arthur Lavenburg, of counsel), for plaintift.

Bertrand L. Pettigrew (Walter L. Glenney, of counsel), for defendant.

CROPSEY, J. Plaintiff was a seaman and he shipped from New York for a trip to South America and return. On the return and when on the high seas plaintiff met with an accident which was in no way due to the fault of the ship but was an incident of his service. Hence his first cause of action, which was to recover for the injuries, was dismissed. His second cause of action charged that the defendant failed to furnish him with reasonably good medical attention. The accident happened when the steamer was only a short distance from some of the large ports of South America, and upon the trial the question on this branch of the case turned upon whether or not the plaintiff requested to be landed at one of those ports. He was not landed there but instead was brought to New York. The jury decided this issue in favor of the plaintiff and there is no ground for interfering with this decision except as to the amount awarded. Under the direction of the court the jury stated separately that the sum of $1,200 was allowed plaintiff upon this cause of action. All that plaintiff could recover under this claim was for the additional pain or suffering and injury that resulted from defendant's failure to furnish reasonable medical attendance. I think the proof does not justify the award made. I think the jury were justified in finding that some additional pain and suffering was endured and that the injury was made worse by reason of the lack of proper attention but under no view of the case do I see how a greater sum than $500 could have been allowed.

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The third cause of action was for "maintenance and cure." That is, it was to recover the reasonable cost of plaintiff's keep after his arrival at New York and after the termination of his contract and during the period that he was unable to work because of the injuries received. For about six months after his arrival at New York plaintiff was in the hospital and under no expense. Thereafter he claimed that for a further period of about six months he was unable to work. The jury awarded $300 for plaintiff's maintenance during that period. The question is whether the plaintiff is entitled to any recovery under this cause of action.

There have been decisions both ways on this question. While they all seem to recognize that the obligation of a ship is to care for a seaman if he becomes sick or is injured while in service some of the cases have limited that obligation to the period of the seaman's employment. But the rule more generally followed, and the one which seems to be supported by reason, holds that the ship's obligation does not end with the termination of the employment but continues for a reasonable period thereafter. The cases on this subject are cited and discussed in *The Bouker No.* 2, 241 Fed. Repr. 831. See, also, *Storgard* v. *France & Canada S. S. Corporation,* 263 Fed. Repr. 545. There is a statement in *Ives* v. *South Buffalo Railway Co.,* 201 N. Y. 271, 311, which it is claimed is at variance with the above cited cases. But that statement was no part of the decision and the decision of this question was not involved.

The further contention is made that even though the plaintiff is entitled to his "maintenance and cure" for a reasonable time after his employment ceases that is only a maritime right and cannot be enforced in a state court. And in support of this

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contention defendant cites *Johnson* v. *Standard Transportation Co.*, 188 App. Div. 934. No opinion in that case is reported but in a memorandum decision the court says: "But the maritime law cannot be administered in the State Supreme Court. It is a matter peculiarly within the jurisdiction of the admiralty courts." This statement was wholly unnecessary to the decision which did not turn upon any such question. Furthermore it is in direct conflict with decisions of the Court of Appeals of this state and so must be disregarded. It is the law of this state that maritime rights may be enforced in the state courts. *Scarff* v. *Metcalf*, 107 N. Y. 211; *Gabrielson* v. *Waydell*, 135 id. 1. And the maritime right in question has also been enforced in the common law courts of the United States. *John A. Roebling's Sons Co. of N. Y.* v. *Erickson*, 261 Fed. Repr. 986; *Storgard* v. *France & Canada S. S. Corporation*, 263 id. 545. These cases still further show that the statement in the memorandum of the Appellate Division in the *Johnson* case, that the maritime law is a matter "peculiarly within the jurisdiction of the admiralty courts" is not correct.

And the same Appellate Division a few months after deciding the *Johnson* case recognized that the admiralty law could be enforced in the state court. *Leone* v. *Booth Steamship Co., Ltd.*, 189 App. Div. 185.

Motion for new trial granted unless plaintiff stipulates within ten days to reduce the amount awarded upon his second cause of action to $500, in which event the motion will be denied.

Ordered accordingly.

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CHARLES H. KAVANAUGH, Plaintiff, v. COHOES POWER AND LIGHT CORPORATION, Defendant.

(Supreme Court, Albany Trial Term, March, 1921.)

**Contracts — equitable interpretation.**

**Conveyance — reservation of rent and right of re-entry for non-payment in perpetual leases creates an estate upon condition — relationship of landlord and tenant — tenant estopped from asserting rights by prescription.**

In the interpretation of a contract the court will endeavor to give it the construction most equitable to both parties instead of a construction which will give one of them an unfair and unreasonable advantage over the other.

Where a conveyance of land to the grantee, his executors, administrators and assigns forever, contains a reservation of perpetual rent, and the right of re-entry for non-payment, the estate created is upon condition and not in fee simple. Such a conveyance creates the relationship of landlord and tenant, and the tenant is estopped from asserting any rights by prescription.

In an action by the purchaser from the tenant of lands held under such perpetual leases, where the tenant had defaulted in the payment of the rent and the landlord and tenant had entered into a contract, after such default of which the purchaser had knowledge, *held*, that the rights of the purchaser were determined by the contract which, fairly construed, limited the purchaser to the amount of water power fixed in the leases and described in the contract and excluding certain excess water power claimed by prescription and estoppel, and that defendant was entitled to a dismissal of the complaint and to an affirmative judgment on its counterclaim cancelling and annuling the leases pursuant to such contract.

ACTION to determine water power rights.

Brackett, Todd, Wheat & Wait, for plaintiff.

Ingraham, Sheehan & Moran, for defendant.

HINMAN, J. The plaintiff purchased certain lands in the city of Cohoes from the estate of Charles H.

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Adams for the purpose of obtaining certain electric power rights from the defendant, a corporation which has installed a hydro-electric power plant in the city of Cohoes. This power plant was installed for the purpose of supplying electric power in the place of water-power which had been supplied for many years in that city by the predecessor of the defendant. The plaintiff's predecessor in title had been supplied with water-power rights under instruments which may be here denominated as perpetual leases, obtained from the predecessor in title of the defendant.

The plaintiff having purchased the lands in question with certain power rights attached thereto from the estate of Charles H. Adams is now demanding judgment from this court determining the quantity of water-power which said premises were entitled to use on the 12th day of December, 1913, the date on which the property of the Adams' estate was destroyed by fire as will hereafter appear, and what quantity of water-power the said lands were entitled to use on the 13th day of October, 1917, the date of the purchase of the premises by the plaintiff and what power rights were acquired by the plaintiff when he purchased said lands on said date.

The plaintiff is further seeking judgment of this court requiring the defendant to enter into a contract with the plaintiff for the supplying of a quantity of electric power equal to the water-power which this court shall determine the said lands were entitled to use at the time when the plaintiff purchased the same and further judgment fixing the damages which the plaintiff has sustained by reason of the defendant's failure and refusal to enter into such a contract and granting the plaintiff judgment for the amount of such damages.

The defendant defends upon the ground that the rights of the parties have been fixed and determined

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by a contract between the defendant and the estate of Charles H. Adams which it is claimed fixes the obligations of the defendant as to the amount of water-power or electric power which the defendant can be required to furnish, namely, the equivalent in electric power of six mill-power, defined in the so-called perpetual leases, rather than the quantity claimed by the plaintiff, namely the equivalent of fourteen and eighty-two one-hundredths mill-power, the difference between which amounts the plaintiff claims he is justly entitled to receive by virtue of prescriptive rights vesting in the estate of Adams which the defendant is estopped to deny and by virtue of a further estoppel running against the defendant in connection with the amount of mill-power or electric power which the defendant is estopped to deny the said lands were entitled to use at the time when the plaintiff purchased.

The defendant, relying upon said agreement between itself and the estate of Charles H. Adams as fixing the rights of the parties, alleges that there was a failure on the part of the plaintiff and said Adams' estate to perform on their part the conditions by them to be performed and demands by way of counterclaim that it have judgment, that the said perpetual leases have been cancelled and surrendered and that upon compliance by the defendant with the terms and conditions of the said agreement between the defendant and the said Adams' estate, the said leases be cancelled and surrendered.

The theory developed by the plaintiff upon the trial seems to me to have deviated from the theory reasonably to have been implied from his pleading to the extent that whereas in the pleading it would appear as a reasonable conclusion that the plaintiff relied upon the said agreement to fix his rights, the proof develops a theory based upon estoppel. The court reached the conclusion during the conduct of the trial that it was not necessary to plead the estoppel and

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great liberality was shown to the plaintiff in permitting introduction of testimony upon the theory of estoppel over the protest of the defendant. The result has been that the problem has been complicated by requiring the consideration of many matters which otherwise would not have been permissible if the theory of the plaintiff had been a reliance upon said agreement.

The court has not changed its mind with reference to this liberal view of the plaintiff's contention and has determined to consider the testimony offered in relation to the matters other than the contract itself for the purpose of shedding such light upon the said contract as may be possible for the purpose of determining its true intent and meaning and for the purpose of determining whether the plaintiff can justly claim any rights by estoppel as against the defendant.

The chief facts leading up to the making of the agreement between the defendant and the estate of Charls H. Adams which was executed October 16, 1916, should be known for the purpose of a proper understanding of the situation of the parties at the time of its execution. Prior to 1849 the Cohoes Company, the predecessor of the defendant, had constructed and thereafter maintained a dam in the Mohawk river above the Cohoes falls by means of which it diverted the waters of said river into a system of canals owned and maintained by it, located in Cohoes and distributed water through said system of canals to various mill and factory sites and the same was used for power and other purposes.

On October 17, 1849, the Cohoes Company by an instrument in writing demised, leased and to farm let unto Egbert Egberts, his executors, administrators and assigns forever, the premises in question, together with the privilege and right to draw from one of the canals of said company a certain amount of water therein prescribed at a certain definite



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yearly rental. By the terms of this instrument the Cohoes Company was entitled to re-enter into and upon the demised premises and repossess itself of the same upon default in the payment of such rent.

About January 1, 1852, the said Egbert Egberts assigned his interest in said premises with the water rights appurtenant thereto to Charles H. Adams. Thereafter and by written instrument dated January 2, 1866, the Cohoes Company granted to the said Charles H. Adams, his heirs, administrators, executors and assigns, the further right and privilege as appurtenant to the lands and premises described in said lease to said Egberts, additional water for what was defined as four mill-power in said instrument upon the payment of further and additional yearly rent therefor.

The said Charles H. Adams died about 1902 leaving a last will and testament which was admitted to probate in January, 1903. William P. Adams, named as one of the executors and trustees, alone qualified as such and continued to be and act as such executor and trustee until after the sale of the premises in question to the plaintiff herein.

A mill was maintained on the said Adams premises for more than thirty years prior to December 12, 1913, when the same was destroyed by fire. There was no measuring device utilized to determine the amount of water-power used at any time.

In June, 1910, the Cohoes Company caused a measurement of the quantity of water passing through the said mill to be made and it was found that the mill was using at that time an average of fourteen and eighty-two one-hundredths mill-power instead of the lesser quantity fixed by the said leases. The measurement made in June, 1910, was apparently the only measurement made during the period of said leases.

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After making the measurements of water power at said premises in June, 1910, the Cohoes Company notified said Adams of the measurements and called upon him to pay the additional rent commensurate with the additional water power which was being used. It seems that for more than thirty years the premises had not been used by Adams but the space therein had been rented by Adams to various tenants, who utilized the water power furnished. When called upon to make such additional rent payments said Adams notified the Cohoes Company that the revenue from his tenants would not warrant his paying the amount so demanded and the Cohoes Company permitted the use of said water-power upon the continuance of the payment of the rental prescribed under the leases of 1849 and 1866.

The testimony fails to show that the said William P. Adams, the executor, or the said Charles H. Adams, ever knew the number of mill-power utilized on said premises prior to the measurements made by the Cohoes Company in 1910, and neither ever at any time claimed the right as against the Cohoes Company to use water-power on said premises in excess of the quantity specified in the said instruments of 1849 and 1866.

In or about the year 1913, the Cohoes Company formulated a plan for the utilization of the water-power of the Mohawk river in the generation of electric power at a central station and the distribution of such electric power among its many lessees and other users of power in the city of Cohoes in the place and stead of the water-power then and theretofore furnished through its canal system. In order to carry out its plan of conversion from water-power to electric power it was necessary to enter into new agreements with the several lessees using water-power for the substitution of electric power in its stead.

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Extended negotiations were entered upon between the said Cohoes Company and its lessees for this purpose which resulted in the preparation of forms of contract whereby the lessees agreed that the Cohoes Company might use the water-power for the generation of electricity at such station, on its agreement to furnish a specified quantity of electric power to the said lessees in place and stead of water-power.

During the progress of such negotiations which lead up to the said forms of contract the lessees of the Cohoes Company who had used water-power additional to the quantity specified in their respective leases and had paid therefore at the rate per mill-power stipulated in their respective leases, asserted a right to the continued use of such water-power, which right was always disputed by the Cohoes Company. To induce the said lessees to enter into contracts for electric power in lieu of water-power, the Cohoes Company consented that the form of contract should contain a clause admitting the right of any lessee who signed such contract to the use of such additional water-power and the forms of contract so prepared recited the use of water-power in addition to that specified in the respective leases and provided for the furnishing of an equivalent of electric energy in lieu of such excess water-power at the same rate per kilowatt hour as the electric energy to be supplied in lieu and stead of the water-power specified in the respective leases.

The said William P. Adams, as executor of the estate of Charles H. Adams, never took part and never was represented in any of the negotiations leading up to the preparation of such forms of contract. The forms, however, as prepared, were printed and sent to said Adams. The final form was agreed upon between the lessees taking part in the negotiations and the Cohoes Company in the year 1916, and a

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printed copy of what is known as the "Knitters' Contract" was sent to said William P. Adams, and contained among other recitals the following:

"WHEREAS, the Grantor (the Cohoes Company) has granted and the Grantee (Charles H. Adams Estate) has been for years furnished and has become entitled to receive from the Grantor additional water to the amount of 8.82 mill power, at an additional yearly rent of $ .00, which additional mill power is agreed to be furnished to the Grantee as appurtenant to and inseparable from said lands described in said hereinbefore recited Indenture and by reason of the grant of said lands therein described which additional mill power with the mill power described in said hereinbefore recited Indenture aggregate 14.82 mill power and which rents aggregate an annual rent of $1200.00."

Said form of contract provided for the confirmation of the demise of the premises described in the instrument of October 17, 1849, with the right and privilege as appurtenant to and inseparable from said lands, to draw and take from the electric service connections of the Cohoes Company at or near the point or points where its service conductors enter the premises, 233,918 kilowatt hours of electric energy yearly in each calendar year between certain hours and for a certain number of working days in the year and to be taken at a certain rate. Said Adams estate was to pay to the Cohoes Company therefor at the rate of $1,200 per annum in quarterly payments of $300. It is to be especially noted that the $1,200 was the aggregate of the rental for water-power under the instruments of October 17, 1849, and January 2, 1866, and that the said 233,918 kilowatt hours of electric energy yearly was the equivalent in electric energy of six mill-power in water-power, the amount prescribed in the said instruments of 1849 and 1866. This form of contract

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was never executed by either party. The said form was retained by said Adams and was delivered by him to the plaintiffs at the time of the sale of the Adams' interest in the said premises which took place in October, 1917.

All of the lessees of the Cohoes Company with the exception of said Adams and one or two others, executed contracts for the substitution of electric energy in the place and stead of water-power. Such contracts provide for priorities in the use of electric power in the event that the Cohoes Company is unable to furnish each lessee his full requirement due to low water in the Mohawk river in dry seasons. For the purpose of establishing such priorities it is provided in such contracts that the persons, firms and corporations enumerated on a schedule thereto attached who shall grant to the Cohoes Company prior to March 13, 1917, the right to take and use for the generation of electric energy water to which they are entitled under their respective leases or otherwise, and to whom the Cohoes Company has granted or may grant the right to take and use for power purposes electric energy so generated, shall be known as "indentured grantees of electric energy" and entitled to the priorities as specified in said agreement. The said schedule in respect of the premises in question in this litigation set forth the name of Charles H. Adams as an indenture grantee under the grants of 1849 and 1866 and set forth the number of mill-power granted by such indentures as six mill-power, and under a heading "No. of Mill Power to which entitled other than by written grants," the figure 8.82, and under a heading, "Total Mill Power," the figure 14.82.

The said Charles H. Adams' estate did not, prior to March 13, 1917, grant to the Cohoes Company the right to take and use for the generation of electricity

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water to which it was entitled, nor did the Cohoes Company prior to said date grant to said estate the right to take and use electric energy for power purposes, and the said Charles H. Adams' estate never became an "indentured grantee of electric energy" within the meaning of said schedule, and as to said Adams' estate the said schedule became wholly ineffective.

The Adams' mill on the premises in question was destroyed by fire in December, 1913, and has not been rebuilt. Said premises at all times since have been vacant and unoccupied and the Adams' estate discontinued the payment of rent for about three years subsequent to October, 1913. The amount of back rents amounted to $3,600, at the time of the agreement between the defendant and the Adams' estate of October 16, 1916. By reason of such default the Cohoes Company was entitled to re-enter into and upon the demised premises and repossess itself of the same. Instead of doing so, however, the Cohoes Company entered into an agreement with the executor of the Adams' estate on October 16, 1916. Since this case is to be largely determined by the exact language of this agreement it is important to consider its exact language. It reads as follows:

"MEMORANDUM of agreement made this 16th day of October, 1916, between the Cohoes Company, a corporation duly organized under the laws of the State of New York, party of the first part, and William P. Adams, as executor of the Estate of Charles H. Adams, deceased, party of the second part.

*Witnesseth:*

"WHEREAS the Charles H. Adams' Estate is the owner and holder of two certain indentures of lease of land and water power made by the Cohoes Company under date of October 17th, 1849, for two mill

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power, and January 2nd, 1866, for four mill power, and

"WHEREAS the mill and buildings located upon the premises in the City of Cohoes, described in the aforesaid grants have been destroyed by fire.

"*Now therefore,* this agreement witnesseth:

"The party of the first part hereby agrees that for a period of one year from this date it will institute no steps, legal or otherwise, for reentry upon the leased premises or to recover the rents now past due and in arrears, amounting on the 1st day of October to the sum of Thirty-six hundred (3600) Dollars, and that during the said period of one year from the date of this agreement the party of the second part shall have full and free opportunity to sell its interest in the property described in the said leases of land and water power.

"In case the interest of the party of the second part in the said lands is not sold before the expiration of the period of one year from this date, then the party of the second part hereby agrees to surrender and cancel the said grants made by the Cohoes Company, upon the waiver by the party of the first part, of all rents due and in arrears, and the payment by the party of the first part to the party of the second part of the sum of Fourteen hundred (1400) Dollars.

"It is further agreed between the parties hereto that in case a sale should be made by the party of the second part of its interest in the property described in the said grants, that said sale shall be upon the express condition that the purchaser shall, upon taking title, pay to the party of the first part all rents then past due and in arrears, and sign, execute and deliver with the Cohoes Company a contract for electrical power in the place and stead of the water power

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referred to in said grants, in either the knitting mill or bat mill form of electrical contract, as said purchaser shall then elect.

"It is further agreed between the parties hereto that the party of the second part shall have the right to cancel and surrender the above mentioned grants of land and water power at any time which it may desire, prior to the expiration of one year from the date hereof, and upon such cancellation and surrender the party of the first part shall waive and release all payments for rent in arrear, and the party of the first part shall pay unto the party of the second part the sum of Fourteen hundred (1400) Dollars.

"*In Witness Whereof* the parties have hereunto set their hands and seals the day and year first above mentioned.

"COHOES COMPANY,
"By LORENZO SEMPLE,
"*President.*
"WILLIAM P. ADAMS, as Executor of
"the Estate of Chas. H. Adams."

By this agreement of October 16, 1916, the Cohoes Company agreed to waive said default in the payment of rent and the consequences thereof including its rights to re-enter and repossess itself of said premises upon the condition that if the Adams' estate should sell its interest in said premises within one year from the date of said agreement such sale should be on the express condition that the purchaser upon taking title would pay all rent in arrears and sign, execute and deliver with the Cohoes Company a contract for electric power "in the place and stead of the water power referred to in said grants." The "said grants" referred to in the agreement are the grants of 1849 for two mill-power and of 1866 for four

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mill-power. At least that is the contention of the defendant, the defendant claiming that the words above quoted are words of limitation and necessarily refer to the quantity of power. The plaintiff contends, however, that it is the fair interpretation of the contract that reference to the grants was not intended to limit the quantity of power but was descriptive of the kind of power to be displaced. It is conceded that the agreement was drawn by the president of the Cohoes Company, and it is contended by the plaintiff that any ambiguity in the contract should be construed most strictly against the party who prepared it. The importance of this question to both of the parties is seen when we consider that the difference in rate of charge for electric energy that would be paid to the company or saved by the plaintiff in connection with the additional mill-power in dispute, would be the difference between about one-half cent per kilowatt hour if covered by the agreement and one and one-half cents per kilowatt hour if not covered by the agreement and if the regular rate of the company as fixed by its schedules filed with the public service commission is to prevail.

On October 13, 1917, three days before the expiration of said agreement between Adams and the Cohoes Company, the said William P. Adams as executor of the estate, by an instrument in writing, conveyed to the plaintiff the premises in question, together with all power rights under the instruments of 1849 and 1866 " together with all rights to extra water power acquired by Charles H. Adams, deceased, by reason of the use of water power in excess of that set forth in said leases." The sale of the interest of said Adams, so made by the instrument of October 13, 1917, was not upon the express condition that the plaintiff should upon taking title, or at any other

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time, pay to the Cohoes Company the rents then past due, or sign, execute or deliver with the Cohoes Company a contract for electric power in the place and stead of the water power referred to in the instruments of 1849 and 1866, nor did the plaintiff by said instrument agree to execute any contract for electrical power, or assume any obligation with respect thereto.

On October 13, 1917, however, the executor of the Adams' estate paid to the Cohoes Company the rent in arrears on said premises amounting to $4,850, and on October 15, 1917, the plaintiff caused to be served on the Cohoes Company the following notice:

"To THE COHOES COMPANY.

"*Cohoes, N. Y.:*

"GENTLEMEN.—*This is to notify you* that I have purchased from the Charles H. Adams' Estate, premises situate on the Northwest corner of Remsen and Factory streets, Cohoes, N. Y., together with all power rights appurtenant to said premises, and that I am prepared and ready to enter into a contract, with your Company, for electric power under your usual form of contract, known as the Knitting Mill Contract, for Fourteen and eighty-two one hundredths (14 82/100) mill power. Said electric power being substituted for the water power to which said premises are entitled, under leases and by usage from your Company.

"This notice is served to comply with the conditions set forth in the contract entered into between your Company and the said Charles H. Adams' Estate, dated October 16, 1916.

"CHARLES H. KAVANAUGH.

"Dated Cohoes N. Y., by

"October 15, 1917. FRANK W. NEARY

"*Attorney in Fact.*"

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The Cohoes Company declined to enter into a contract with the plaintiff for the supply of electric power the equivalent of fourteen and eighty-two one-hundredths mill-power and stated to him that the premises were entitled to but six mill-power.

I am unwilling to determine the issues between these parties upon the basis of the failure to have expressed in the deed that the conveyance was made upon the express condition that the rents in arrears should be paid by the grantee, and that such grantee should agree to enter into such an electrical contract. While the plaintiff did not expressly assume the contemplated obligations, the rents were in fact paid, and the plaintiff immediately made an offer to the only person interested with reference to the signing of an electrical contract. The real question is whether the offer then made meets the terms of the agreement between Adams' estate and the company.

The mutuality contemplated by the contract such as would be enforceable by the company was accomplished by the offer made so far as the electrical contract was concerned and if the plaintiff had made an offer to contract for six mill-power instead of the fourteen and eighty-two one-hundredths mill-power, it would seem clear to me that the defendant could be compelled to live up to an agreement implied from the whole tenor of its contract with the Adams' estate, but that question is not presented in as much as this is not an action to compel the making of such a contract for the equivalent of six mill-power. The defendant has never been requested to make any such contract and it has never declined to make such a contract.

It is the claim of the defendant that the Adams' estate failed to comply with the condition in its contract of October 16, 1916, with reference to an elec-

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trical contract in the place of water-power for six mill-power and that the default of the Adams' estate in payment of rent was never waived and that the Cohoes Company was entitled to re-enter in and upon the demised property and repossess itself of the same. The defendant offered on the trial of this action to return or pay into court the rent paid by the said Adams October 13, 1917, with interest thereon to date of payment, and also the sum of $1,400 provided for by said contract with interest thereon.

It becomes clear from the foregoing statement of facts that on October 16, 1916, the date of the contract between the defendant company and the Adams' estate, such estate was in default in the payment of its rents and had been for three years, and that the company had the right at that time to re-enter and repossess itself of the property under the terms of the instruments of 1849 and 1866.

It is clear that being in default the said estate had no rights to assert either as to the water-powers expressly granted by the lease or as to any excess water-powers that might have accrued to it. It was the agreement of October 16, 1916, which revived any rights that the estate may have possessed prior to its default and so far as the estate and those holding under it are concerned, their rights must be fixed by the agreement itself, unless there has accrued to the plaintiff some additional right by way of estoppel which question will be considered later. The only object of considering whether the Adams' estate had ever been possessed of rights by prescription or estoppel, to additional water-powers beyond those expressly set forth in the instruments of 1849 and 1866, arises out of the fact that there is a contention between the parties here as to the quantity of water-power, if any, referred to in the agreement of October

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16, 1916. In other words, as bearing upon the mutual intention in interpreting this contract, an important question arises as to whether the estate had ever had any right to this excess water-power.

The court will endeavor to give that consideration to a contract which is most equitable to both parties instead of a construction which will give one of them an unfair and unreasonable advantage over the other. *Fleischman* v. *Furgueson,* 223 N. Y. 235.

In determining whether the Adams' estate ever acquired any right by prescription to any water-powers in excess of those granted in the instruments of 1849 and 1866, it becomes necessary to consider the question of the relationship of the parties created under these instruments. Did they create the relationship of landlord and tenant? This appears to be important because it is fundamental that the tenant cannot set up adverse possession while the relationship of landlord and tenant continues. The tenant cannot dispute the title of his landlord. But when does this relationship exist? Does a conveyance with a reservation of rent create it? Has the constitutional provision abolishing feudal tenures and their incidents in any way affected this matter, or is the relationship a thing separate and apart from tenure as known at the common law? It is the claim of the plaintiff that the rule prohibiting a tenant from acquiring a title by adverse possession against his landlord has no relation in respect to a grantee of an estate of inheritance, where provision has been made for the payment of a perpetual rent with the right of the grantor to re-enter upon default in the payment thereof. It is the claim of the plaintiff that an estate of inheritance was created. It is the claim of the defendant on the other hand that the instrument of 1849 did not convey the fee of the demised premises,

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but was at most a life estate during the life of the lessee. The provision in the instrument of 1849 which is important for our consideration is that the " parties of the first part for and in consideration of the yearly rents, covenants and conditions hereinafter contained on the part of the said party of the second part, his executors, administrators and assigns, to be paid, kept and performed, have demised, leased and to farm let unto the party of the second part, and to his executors, administrators and assigns, all that certain, piece or parcel of land, etc. * * *

" *To have and to hold* the said parcel of land with the privileges and appurtenances unto the said party of the second part, his executors, administrators and assigns forever. * * *

" *Yielding and paying* therefor, yearly and every year thereafter unto the said parties of the first part or their assigns, the yearly rent," etc.

Setting forth as the basis of such rent the rental value of a certain amount of water power described in the instrument and made appurtenant to the premises.

It was further covenanted and agreed that the Cohoes Company should have the right of re-entry in the case that the rents were not paid.

The words " demise, lease and to farm let " contained in this instrument are apt words of a lease. Watk. Conv. 207. Technically and in its proper significance the term " lease " refers to a deed of a less interest than the lessor has, for, as Blackstone says, if it is of the whole interest it is more properly an assignment than a lease. 2 Black. 317.

Also, a lease is usually and properly in consideration of a yearly rent, as is the instrument in question, and the proper language for reserving it is " yielding and paying therefor yearly " during the

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term, the rent in the amount named. An assignment, on the other hand, is properly the transfer of one's whole interest in any estate, but it is generally appropriate to the transfer of chattels either real or personal, or of equitable interests. Watk. Conv. 227; 2 Black. Comm. 326.

If the conveyance in question is in fee, it may, in want of a better term, be called a lease as it is in that form, though it is in the nature of an assignment.

The lease of 1849 runs to Egbert Egberts, his executors, administrators and assigns, forever. At common law this would convey but a life estate. The rule is stated by Littleton thus: "For if a man would purchase lands or tenements in fee simple, it behooveth him to have these words in his purchase, To have and to hold to him and to his heirs; for these words [his heirs] make the estate of inheritance. For if a man purchase lands by these words, To have and to hold to him forever; or by these words, To have and to hold to him and his assigns forever; in these two cases he will have but an estate for term of life, for they lack these words [his heirs], which words only make an estate of inheritance in all feoffments and grants." Littleton, § 1.

At the time the lease in question was made, however, our Revised Statutes provided that words of inheritance were not requisite to create or convey an estate in fee, and that every grant or devise of real estate, or any interest therein, shall pass all the estate or interest of the grantor or testator, unless the intention to pass a less estate or interest shall appear by express terms, or be necessarily implied in the terms of said grant; and the Revised Statutes further provided that in the construction of every instrument creating or conveying any interest or estate in land, it shall be the duty of the courts of justice to

carry into effect the covenant of the party so far as such covenant can be collected from the whole instrument and is consistent with the rules of law. R. S. pt. II, chap. 1, title V, §§ 1, 2. These sections have been substantially continued in the Real Property Law. Real Prop. Law, § 240.

The conveyance in question runs to Egbert Egberts, his executors, administrators and assigns. The habendum reads that Egberts is to have and to hold said piece or parcel of land unto himself, " his executors, administrators and assigns forever." These words, considered without reference to technical rules, are inconsistent with a mere life estate. An estate for life does not run to a person and to his executors and administrators. It can be measured only by a life, and it does not survive to executors or administrators of the person whose life measures the duration of the estate, and who is the owner of the estate. Moreover, the use of the word " forever " in the habendum is inconsistent with a mere life estate. Neither can the conveyance be considered a lease for a term of years, because there is no definite term set forth. It is essential to create a lease for years that the term be certain. It must have a certain beginning and a certain end. Co. Litt. 58. There must always be a time absolutely fixed, beyond which the estate cannot continue. There may be a term created for 99 years, " provided 'AB' live so long. Here, if 'AB' die before 99 years expire, the term shall cease, but, though 'AB' should survive the 99 years, the lease on the expiration of the 99 years would be absolutely at an end." Watk. Conv. 12.

Since words of inheritance are unnecessary to create a fee, the terms of the instrument are consistent with the existence of such an estate, and inconsistent with a lesser interest.



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The estate created, however, is not in fee simple absolute, but by reason of the reservation of the rent and right of re-entry for non-payment, it is an estate upon condition. *Van Rensselaer* v. *Ball,* 19 N. Y. 100; 2 Black. Comm. 109.

Not only the terms of the instrument indicate that an estate in fee rather than a life estate was intended to be created, but the form, likewise, leads to this conclusion. The instrument is partly written and partly printed. The printed part was drawn by a skillful conveyancer in the form of a lease for years, with a blank in the habendum for the statement of the term. When this conveyance was drawn the parties used the printed form and in the habendum instead of inserting a term of years, inserted the word "forever." Undoubtedly, the intention of the parties was to create an estate in fee, and they used the printed form because it was conveniently at hand, adapting it as best they could to the agreement of the parties.

Having reached this conclusion, we are next confronted with the vexing question whether a conveyance in fee reserving to the grantor and its successors and assigns a perpetual rent with a right of re-entry on default of payment, creates the relationship of landlord and tenant so as to estop the plaintiff from asserting any rights by prescription.

At the present time the relationship described by the words "landlord and tenant" is ordinarily understood to mean that existing between a lessor and lessee in reference to an estate for years. When we use these words in reference to an estate of inheritance, we have difficulty if we attempt to obtain any insight into the rules applicable thereto, from precedents in our courts. And because of our unfamiliarity with the English system of landholding except in a desultory historical way, we are bound to be somewhat

laborious, when we attempt to trac
apply them to modern conditions. E
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longer in general use.

The decay of the relation of lord an
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began. The ancient rules which, in the
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slowly adapted to changed conditions
and extended by legislative enactment
a system of land law entirely different
original. The contrast between the ol
is striking. A line of demarkation ca
although there have been some abru
tionary changes. Thus, under the
where a mesne lord made a feoffment
to the feoffee and his heirs rendering
forming services, the relation of lord a
constituted between the parties, the t
of the lord and thus by tenure. The i
must be a tenure to constitute the relati
tenant or landlord and tenant persisted
after the statute of *Quia Emptores* whi
to promiscuous subinfeudation. Ther
tenure could not be created upon a con
(except in case of the king, etc., not
notice, *People* v. *Van Rensselaer*, 9 N.
upon the conveyance of a lesser estate
in fee, a tenure, though imperfect, wou
incident to the reversion. Thus a reve
essary to create a tenure, and tenure
to constitute the relation of landlord a

The reasons for these rules, I wi
discuss.

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By the law of England, there is a fundamental maxim or fiction (Wright Ten. 58) that all lands and tenements are holden mediately or immediately of the king. Co. Litt. 1a. The thing holden is styled a tenement, the possessor, a tenant, and the manner in which it is held, the tenure. 2 Black. Comm. 59. Tenure has been the backbone of the English system of landholding; it always implies the relation of lord and tenant or landlord and tenant. All lands in England in the hands of a subject necessarily are held of some superior lord (Co. Litt. 1b), if not of a mesne lord, then of the king as lord paramount. It was by implication of this theory that the king, after the conquest, granted, regranted, or in effect at least confirmed to the chief men of the kingdom large parcels or tracts of land called feoda in return for services. According to the custom of the times these chief tenants, if they had not already done so, in turn, granted to others, portions of their lands to hold of them by the performance of services, and thus the process of subinfeudation was continued to the lowest tenant who cultivated the land and gathered the crops. The lowest or tenant paravail performed his service to the next superior in order. Wright Ten. chap. II; Digby's Hist. Law of Real Prop. (5th ed.) 37; 1 Pollock & Maitlondi Hist. Eng. Law, 232–240; 2 Black. Comm. 45, 59; Comyn Lord & Ten. Int.; Burton Real Prop. 316; Gilbert Rents, 1; Watkins Ten. XIII; Bell Land. & Ten. 6–10; 1 Reeves Hist. Eng. Law (Finlason), 238.

In this manner was the relation of lord and tenant created. There may have been a long train of subordinate lords between the king and the actual tenant of the land. The duties owing by each tenant to his superior constituted the tenure of the land, and the corresponding right in each superior was called the seignory. Burton Real Prop. 316. Where the tenant

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paravail was a tenant in fee, the tenure was perfect and constituted a substantive and independent seignory. The seignory somewhat resembled a reversion as this term is used in the law of estates. Burton Real Prop. chap. VI. Thus, as one of the fruits of a seignory is escheat, which signifies properly when by accident the lands fall to the lord of whom they are held, as by the tenant's failure of heirs or attainder of treason, it resembled a reversion. 2 Britton, chap. VI; Co. Litt. 13a.

Indeed, an escheat has been called a reversion, though improperly. Digby Real Prop. (5th ed.) 226, n. 1. A reversion proper arose when a tenant in fee simple made a gift in tail, or a lease for life or years. Lord Coke in his commentaries on Littleton gives other examples but in the last analysis it appears that in these there is always a remnant of the fee left in the grantor, however complicated the limitation. Co. Litt. 22b.

In the year 1290 the custom of subinfeudation had become intolerable, whereupon the statute *Quia Emptores* was enacted. 18 Edw. chap. 1.

Thereafter no new tenure could be created on a feoffment in fee simple, unless by the king or a tenant *in capite* (which it is not here necessary to notice) because by the force of the statute, all lands and tenements so granted were held of the chief lord of the same fee by such services and customs as the feoffor held before. Burton Real Prop. 317; 2 Black. Comm. 91.

The effect of this statute was to prevent subinfeudation, and to permit alienation of lands in fee, free and clear of any new tenure.

Before the statute of *Quia Emptores* if a man made feoffment in fee simple, yielding to him a certain rent, this was a rent service and a tenure was created

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between the parties. The relation of landlord and tenant was thereby created and as an incident thereto the landlord by reason of the relationship might distrain as of common right. So too where a feoffment in fee was made before the statute and there was no reservation of any rent or service yet the feoffee held of the feoffor by the same service as the feoffor did hold over of his next lord paramount. In such a case a tenure was created and the relationship of landlord and tenant came into existence, for the feoffee held of the feoffor and not of the lord next paramount to the feoffor. After the statute this would not be a fact. When the feoffor parted with his fee the relationship of landlord and tenant did not spring up as between the feoffor and feoffee but the lands were held by the feoffee under the old tenure, that is of the landlord of whom his donor held.

From this it is observed that after the statute of *Quia Emptores* where there was a conveyance in fee reserving a rent without a clause of distress in the deed, the rent was a rent seck, that is to say, a barren rent, because, as there was no reversion the relationship of landlord and tenant did not exist, and, therefore, the feoffee could not distrain as of common right.

Where, however, a clause of distress was inserted in the deed the rent was a rent charge and the feoffee would have the right to distrain, not because the relationship of landlord and tenant existed between the parties, but simply by reason of the clause in the deed. The right to distrain in such a case arose by means of the agreement or convention of the parties and not by reason of the relationship which arose under the deed. The binding tie between the landlord and the tenant was fealty which was inseparably incident to the reversion. In the case of feoffment in fee reserv-

ing a rent after the statute, fealty did not exist between the immediate parties to the deed as there was no reversion. This is explained at length in the sections relating to rents in Coke upon Littleton.

By the statute 4 Anne, chapter 16, the necessity for attornment was done away with and by the statute 12 Car. 11, chapter 24, military tenures were converted into free and common socage. Successive alienations of fees gradually weakened the tie between lord and tenant and the relation generally became obliterated except in existing manors. Digby Real Prop. (5th ed.) 235. The relation of landlord and tenant however, especially in cases of estates for years, became a developing institution, as is evidenced by the Landlord and Tenant Acts beginning in 1709. Although fealty became a mere fiction and tenure little more than a theory as its burdensome incidents were swept away, it appears to me beyond question that English lawyers at the time of American independence had no other notion than that a reversion was necessary to constitute the relation of landlord and tenant, and I so understand the holding in *Pluck* v. *Digges,* 2 Dow & C. 180.

By the first Constitution of the state such parts of the common law of England and of Great Britain and of the acts of the Colonial legislature as together formed the law of the colony at the breaking out of the Revolution were declared to be the law of this state, subject to alteration by the legislature. Art. 35. The statute of *Quia Emptores* and other acts contained in the compilation of Jones & Varick were reenacted by the legislature so that our statutory record would be as complete as possible. The effect simply was to continue on our own statute book, statutes which had always been the law of the colony. *Van Rensselaer* v. *Hays,* 19 N. Y. 68. Practically, there-

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fore, the law of landlord and tenant was imported from England in substantially the condition in which it existed in that country at the breaking out of the Revolution. Its applicability, of course, was sometimes a question owing to the different conditions in a new and unsettled country.

However, in this section of the state, both before and after independence, it was customary for the Van Rensselaers to convey farms in fee reserving a rent either in money or in kind, with a right of re-entry and distress. These perpetual leases, as they were called, came before the courts in a number of cases and were declared effectual. *People* v. *Van Rensselaer,* 9 N. Y. 334; *DePeyster* v. *Michael,* 6 id. 467; *Devisees of Van Rensselaer* v. *Executor of Platner,* 2 Johns. Cas. 26; *Watts* v. *Coffin,* 11 Johns. 495; *Van Rensselaer* v. *Bradley,* 3 Den. 135; *Van Rensselaer* v. *Jones,* 5 id. 449; *Jackson* v. *Collins,* 11 Johns. 1; *Van Rensselaer* v. *Jewett,* 5 Den. 121; *Van Rensselaer* v. *Hays,* id. 477; *Van Rensselaer* v. *Snyder,* 13 N. Y. 299; *Main* v. *Feathers,* 21 Barb. 646; *Van Rensselaer* v. *Bonesteel,* 24 id. 356; *Van Rensselaer* v. *Gallup,* 5 Den. 454; *Van Rensselaer* v. *Roberts,* id. 470.

The system of perpetual leases and rents developed bitter controversies which culminated in the anti-rent wars in this vicinity. These were finally settled by the decision of the Court of Appeals in *Van Rensselaer* v. *Hays,* 19 N. Y. 68, and a few later decisions on the same subject.

It is not clear whether the Court of Appeals in the early cases intended to decide that the relation of landlord and tenant was created by a perpetual lease.

In *Van Rensselaer* v. *Hays,* 19 N. Y. 68, it was held that the defendant as assignee of the grantee of land held under a lease in fee subject to a rent charge, was liable to the plaintiff who was the representative of

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the grantor for the rent accruing after the assignment. The court based its holding on chapter 98 of the Laws of 1805 which enabled the grantees of reversions to take advantage of the condition to be performed by the lessees and which also provided that it applied to grants or leases in fee reserving rents as well as to leases for life or years.

Anson Bingham, counsel for the appellant, contended that a reversion was necessary to constitute the relation of landlord and tenant and later in his treatise on the Law of Real Property, he discusses this question at length. His comments are interesting as a matter of history as they show the confusion which existed in relation to this subject.

Mr. Bingham says that in a more recent case, *Van Rensselaer* v. *Read,* 26 N. Y. 563, the same court declared it to be a settled proposition that, since the passing of the act of 1787, concerning tenures, it has not been possible to create any new tenures in this state upon conveyances in fee. See, also, *Van Rensselaer* v. *Dennison,* 35 N. Y. 393.

It must, therefore, be regarded as the settled law of the state that a feudal lord, in other words, the lord of an estate in fee, does not exist in the state, except as that position is represented by the state in its sovereign capacity. It may indeed be truly remarked, that no other point of the law has ever been, in so short a time, so often, so expressly, so uniformly and so decisively pronounced by any one court as that point has been. Each successive decision, from *DePeyster* v. *Michael,* in 1852, down to *Van Rensselaer* v. *Dennison,* in 1866, has been more emphatic than its immediate predecessor. The case last named has left that point so expressly and so fully pronounced, that no other decision can ever make it more distinct and emphatic.

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But what makes the decisions referred to particularly worthy of comment, is the fact that, excepting the case first named, while they have pronounced the law in favor of one party, they have pronounced the judgment of the court in favor of the other party. In the *DePeyster* case, they conformed the judgment to the law as they pronounced it. In the other cases, they decide the law one way and give judgment the other.

In *Van Rensselaer* v. *Read,* 26 N. Y. 558, it was held that the assignee of such a rent might maintain an action on the covenant at common law, irrespective of the statute of 1805. In the course of the opinion in this case it is intimated that the relation of landlord and tenant is created between the parties to a lease in fee reserving a rent.

In *Hosford* v. *Ballard,* 39 N. Y. 147, it appeared that the plaintiff brought an action of ejectment to recover possession of lands held by the defendant under grant in fee reserving rent. The court held first that the title of the plaintiff was sufficiently shown, and second that the plaintiff was entitled to recover without a demand of the rent. On the second question it was argued before the court that the provisions of 2 Revised Statutes, part III, chapter 8, title 9, article 2, section 1, which dispensed with the necessity of the demand, did not apply, for the reason that the plaintiff was not a landlord and defendant was not a tenant.

The court said: "This is an erroneous restriction of the meaning of the terms 'landlord and tenant.' One who holds lands by any kind of title, whether for years, for life, or in fee, is tenant, and he of whom land is held subject to the rendering or payment of rent or service is landlord. The cases which hold that since the act of 1787 concerning tenures no feudal ten-

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statute so highly remedial should be
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tress and of re-entry existed."

In *Van Rensselaer* v. *Dennison,* 35
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attached to an estate granted by
another.

In *Cruger* v. *McLaury,* 41 N. Y. 219
action of ejectment to recover possessi
vided one-sixth part of a lot held under
reserving a rent with a condition of r
of non-payment, the plaintiff claimed
one of six children, the heirs of the ow
charge. The court held that she mig
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tain an action upon the covenant to rec
of the rent due him.

In *Saunders* v. *Hanes,* 44 N. Y. 353,
as to the title to a mill seat situate on a
The majority of the court held that the
veyed a fee with reservation of the rent

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concurred in the result but placed his holding upon other grounds than those announced by the majority of the court. He held that the indenture in question conveyed a life estate to the grantee subject to the payment of rent and that the heirs of the grantee who continued to hold the mill seat and pay the rent established a claim of adverse possession. He also held that the rule that the relation of landlord and tenant establishes an allegiance by the tenant to his landlord, and prohibits the tenant from denying his landlord's title, did not conflict with the right of the defendant to interpose the defense of his adverse possession. He based this ruling upon the fact that the original entry was for the life of the grantee subject to the rent and that after his death the defendant and those under whom he claimed for a space of over fifty years, claimed an absolute title to the mill seat, subject to the precise allegiance under which the life tenant entered and that as the defendant or those under whom he claimed continued to hold the property under the same terms as the life tenant and the plaintiffs had acquiesced in it and received the rent, it justified the presumption that the character of the title had been changed to accord with what one claimed and the other by lapse of time had conceded.

In *Central Bank of Troy* v. *Heydorn*, 48 N. Y. 260, it appeared that the plaintiff commenced an action to recover rent for certain premises under conveyance in fee, reserving a rent charge. It was held that, notwithstanding the strict relation of landlord and tenant did not exist between the parties, the assignee of the rent was entitled to recover the rent due and unpaid for the twenty years preceding the action as the covenant sued upon remained in the possession of the plaintiff uncancelled and was produced and read in evidence; that while the law presumed payment prior

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to the twenty years there was no presumption even upon proof of non-payment of the rent for the period of sixty-three years before the commencement of the action that the rents had been extinguished and the covenant released.

To the same effect was the holding in the case of *Lyon* v. *Odell*, 65 N. Y. 28. In this case the court assumed that the relation of landlord and tenant existed between the parties.

*Bradt* v. *Church*, 110 N. Y. 537, was an action of ejectment. It appeared that lands were covered by a Van Rensselaer lease made in 1794; that defendant Church succeeded to the interest of the lessor and in 1881 obtained possession under a judgment in an action of ejectment brought under a right reserved in the lease to re-enter for non-payment of rent against one in possession as tenant of Bradt, the plaintiff. Bradt, the plaintiff, was not a party to the former action of ejectment. It was held that while the judgment in the former action was not conclusive upon Bradt, the plaintiff, who was not a party to that action as to the averments in the complain therein, yet it was against the person then in actual occupation and that the defendant Church's entry thereunder was lawful, and enabled him to defend his title and possession against the plaintiff's claim. The plaintiff, Bradt, claimed title under a deed of release and quit-claim made in 1863, with prior possession in the grantors from 1850. No proof was given as to the sources of the title of said grantors. It was held that in the absence of proof to the contrary the occupation of plaintiff's grantors was controlled by the presumption that when the relation of landlord and tenant is once established it attaches to all who may succeed to the possession under the tenant; that plaintiff's deed did not necessarily imply a title hostile to that of the land-

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lord and that, therefore, he failed to show title superior to that of the defendant.

This case appears to be a direct and positive authority for the proposition that for the purpose of determination of the existence of adverse possession, the relationship of the parties to the perpetual lease is considered to be that of landlord and tenant. It is difficult to see how this decision can be sustained on any other theory.

*Church* v. *Shultes*, 4 App. Div. 378, was an action of ejectment brought in this county. It appeared that the land in question had been leased by a perpetual lease subject to the payment of a rent charge. It was held that the relation of landlord and tenant existed between the parties to the lease and their successors in title, and that the provisions of section 373 of the Code of Civil Procedure applied in determining the question of adverse possession.

It thus appears that the authorities on the subject in this country seem to lack support in the old common law, and it is not surpising that confusion should have arisen in the mind of Mr. Bingham leading him to make the statement which I have quoted above, to the effect that while the courts had pronounced the law in favor of one party, they had pronounced the judgment of the court in favor of the other party.

In the light of the cases decided subsequent to *Van Rensselaer* v. *Hays, supra,* however, this seeming incongruity disappears. Consider for instance the opinion of Judge Gray in *Central Bank of Troy* v. *Heydorn, supra.* He states that the strict relation of landlord and tenant does not exist between the parties to a perpetual lease. In *Lyon* v. *Odell, supra,* the court says that where the relation of landlord and tenant is once established under a sealed lease the mere circumstance that the landlord has not demanded

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one to the other, however, has come about so gradually and so naturally that it is confusing to attempt to trace it.

It seems to me that the Court of Appeals in the cases which I have reviewed has consistently adhered to the distinction which I have indicated, although the court does not seem to have announced it in so many words. It was the failure of Mr. Bingham to note the distinction which lead him to assert that the Court of Appeals in the *Van Rensselaer* cases held the law in favor of one party but gave judgment in favor of the other. He overlooked the fact that the court was dealing with a conventional relation and not with the feudal relation of landlord and tenant which, of course, he could not conceive where there was no reversion in the grantor under the lease.

I have thus reached the conclusion that the instruments of 1849 and 1866 constituted the conventional relationship of landlord and tenant, notwithstanding the fact that at the common law there was no such thing as a perpetual lease; and I have determined that even though the rights of the tenant were almost as extensive as those of an owner, nevertheless, the obligations with reference to the water-power were always dormant.

The plaintiff here may contend that the additional water-power, which he claims, is not included within the terms of the lease, but in addition thereto, and, therefore, the relation created under the lease could not affect in any way his rights in the additional water-power. It is undoubtedly true that a tenant of one piece of land may acquire title by adverse possession against his landlord as to another piece of unrelated land. Where, however, additional land is acquired by the tenant for the more profitable enjoyment of the demised premises and physically con-

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nected therewith, the rule would be otherwise. The same principle should apply to an easement. *Bedlow* v. *New York Floating Dry Dock Co.*, 112 N. Y. 262, 283. The use by any of the company's lessees of water-power in excess of the quantity specified in its lease under the facts in this case could never give rise to a prescriptive right.

Moreover, assuming that a prescriptive right might arise, I am not convinced by the proofs that the use of excess water in this case was ever open, notorious or adverse. The water was carried to the premises of the user in a penstock under ground and passed through no measuring device. The flow of water through a penstock of a lessee in excess of the quantity provided for in his lease was not necessarily detrimental to the interests of the company, in that such flow served to maintain the required level in the next lower canal and such flow would have to be provided by the company through its spillways had it not passed through the penstock of the lessee. Hence, the use was not adverse or detrimental to the company. The proof fails to show that the company had knowledge or ought to have known the quantity being used. It was obliged to rely upon the integrity of the user, that he would observe the covenants of the lease not to use more than provided for therein except as the company might have determined the quantity being used through a scientific device or computation requiring technical knowledge for the determination. There is no evidence that the company had any knowledge of the quantity of water being used until the measurement of 1910. Mr. Adams who had been in charge of the premises since 1886 testified that he never knew the quantity of water that was being used until notified of the results of this measurement of 1910, and never knew that he was using prior to that time any



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quantity in excess of the quantity specified in the leases. He testified that he never claimed a right to use water-power in excess of that quantity.

The case of *Union Bag & Paper Co.* v. *Allen Brothers' Co.*, 107 App. Div. 529, cited by the plaintiff, is not applicable to this case. That was a case where there was a written agreement between the parties which was ambiguous in reference to the amount of water each was entitled to and the court received evidence of the practical construction of the agreement put upon it by the parties by their operation under it for a series of years and construed it in the light of such practical construction.

In taking up for discussion the rights which existed under these ancient grants, together with the history of the relations between the defendant company and Adams, I have given the plaintiff the benefit of the doubt as to whether the written agreement of October 16, 1916, might be in fact ambiguous in reference to the amount of water to which these premises were entitled. But even if we construed the language of the contract of October 16, 1916, as merely descriptive of the kind of power to be displaced instead of stating the limits as well, what foundation is there for the plantiff to claim the additional eight and eighty-two one-hundredths mill-power, if Adams never had a right to it, never claimed it, never paid for it, and did have it offered to him in electrical equivalent in the proposed contract for electrical power, which he received shortly prior to making the agreement of October 16, 1916? Under such circumstances there should be no implication that it was the intention of the parties to include it. On the contrary the situation which had existed between those parties would justify the conclusion that an intent to include the additional eight and eighty-two one-hundredths mill-

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power should have been clearly expressed in order to warrant such an interpretation.

My consideration of the history of the relations between the defendant company and Adams and their predecessors in title, leads me to the conclusion that the only fair interpretation of the contract of October 16, 1916, is that it was intended to limit the mill-power to six mill-power.

Having reached that conclusion I fail to see how estoppel or prescription has anything to do with the case. What the Cohoes Company did and said before making that contract was merged in it. I have considered such evidence, however, only for the purpose of interpreting its provisions upon the theory of a possible ambiguity. I have reached the conclusion that there is no ambiguity to be resolved against the company. If Adams had never had a right to such additional power, nor even a right to expect it by virtue of any compromising act or word of the company, any presumption that might have favored him and his assignee in the interpretation of the contract, due to the fact that it was drawn by the company's president, would not arise. The agreement was not a harsh one, but a just if not a generous proposal and one entitled to be construed in accordance with its plain terms rather than enlarged by implication.

If the contract of October, 1916, had not been made surely plaintiff would not have a cause of action for any of the relief demanded in his complaint, for without that contract there was no obligation on the defendant to make an electrical contract as to these premises. If the plaintiff did not see the contract, he cannot shield himself behind the refusal of Adams to show it to him. He assumed the risk and took his chances as to its wording. He could have taken up the matter with the company before it was too late.

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He knew that a contract had been made. The proof shows that since the fire in 1913, the premises enjoyed no power of any kind and the Cohoes Company had constructed a permanent concrete wall shutting off the water from the premises, both of which should have put the plaintiff upon inquiry as to what power rights, if any, the premises continued to enjoy. Mr. Adams says the plaintiff did call him on the telephone, that he had agreed to purchase the premises and said that he thought there were fourteen mill-power when he offered to buy, because he had seen some memorandum on some other lease. Mr. Adams says he told him he did not know anything about that and that the plaintiff said: "If there is only six, why we will call the sale off," and Adams said: "All right." Adams said to the plaintiff at the time of the final closing of the transaction with the plaintiff that he would only guarantee six mill-power but if there was any more than that the plaintiff was certainly entitled to it as he was selling the plaintiff everything the Adams' estate had. Adams says: "I repeated a number of times that all I could guarantee was six." This testimony of Adams is uncontradicted.

The plaintiff also talked with Mr. Wertime in reference to the mill-power and Mr. Wertime swears that he told plaintiff that Mr. Adams had made an agreement with the company by which the premises were limited to six mill-power. The testimony of Mr. Wertime is not directly contradicted. The plaintiff simply says that Wertime told him that if plaintiff would sell Wertime the land he would be sure to get the plaintiff the fourteen and eighty-two one-hundredths mill-power.

It is not claimed that the plaintiff ever saw any recital as to the number of mill-power connected with these premises except in the schedule attached to the so-called Benson contract, of which the plaintiff took

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an assignment and in the proposed electrical contract relating to the premises in question, which the plaintiff received from Adams at the time of his purchase. The contract had been submitted to Adams by the company but he had not signed it. In that contract it was plainly shown that the electric current to be furnished was the equivalent of six mill-power and the rental to be paid was $1,200. The plaintiff says: "I just saw the front page of it and it said 14.82 mill power." The plaintiff knew that the rate was $200 per mill-power. He admits knowing that $1,200 would not represent the fourteen and eighty-two one-hundredths mill-power because he already was paying on another lease at the rate of $200 per mill-power. He had heard that the Adams' estate had never paid more than $1,200.

The proposed electrical contract handed to him by Adams, in the same paragraph where it mentioned the figure fourteen and eighty-two one-hundredths contained the statement that the additional water-power to the amount of eight and eighty-two one-hundredths mill-power was to be at an additional yearly rental of "$ .00."

The plaintiff had no right to rely upon any declaration in the schedule, nor the figure 14.82 on the front page which was inconsistent with the plain terms of the contract as a whole, which he could have discovered if he had exercised any care in reading it.

Moreover, the schedule of proposed indentured grantees was prepared for a certain and definite purpose as set forth in the contracts to which it was attached. It is a statement concerning persons who may secure rights in the future for electricity which must be secured by March 13, 1917. One who failed to sign before that date would not be an indentured grantee entitled to the water-power set forth in the schedule. If he failed to sign by that date, the fact that

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his name might continue to be upon the schedule was thereafter of no value to him whatsoever. No electrical contract was signed for the Adams' premises within the date specified and thus the schedule became ineffective for any purpose in respect to these premises. This was a fact with knowledge of which the plaintiff was charged because it was plainly stated in both the Benson contract and the contract handed to him by Mr. Adams. The company cannot be bound by any admission beyond the conditions for which the admission was expressly made.

The proposed electrical contract for the premises in question was not capable of the construction placed upon it by the plaintiff and his failure to carefully read it ought not to accrue to his advantage by way of estoppel against the company.

So we get back to the plain terms of the agreement of October 16, 1916, which I have already interpreted. If that agreement was for six mill-power how can the company by estoppel be compelled to give the plaintiff the benefit of it, even if sufficient facts had been proved to justify the conclusion that the company had made a misrepresentation with full knowledge of the fact contained in such contract of October, 1916, and that the plaintiff in ignorance of the facts had acted upon such misrepresentation?

The company and Adams had a right to adjust their affairs so as to provide for the payment of the back rent and the execution of the electrical contract by entering into the agreement of October, 1916. When that contract was executed, the rights of the parties were merged in it and the parties were bound according to its plain terms. The rights of Adams did not suffer any violence when interpreted in accordance with such plain terms. The plaintiff was bound by it as the assignee of Adams and the hands of the com-

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pany were as effectually tied as were those of Adams and the plaintiff. Any extension of the terms by the company thereafter directly or by estoppel would constitute a gratuity and a gratuity would not sustain the company in granting a rate at less than those fixed by the schedules filed by it with the public service commission. The case might be different if there was an ambiguity in the contract which was resolved against the company by the court. But there is no such ambiguity here, as I have held.

All of the above considerations must lead to the conclusion that the plaintiff's complaint should be dismissed. It remains only to consider the counterclaim of the defendant and the relief therein sought.

On the 13th day of October, 1917, Adams paid the rent with the statement that he had disposed of his interests in the property to the plaintiff. The Cohoes Company in accepting that rent had the right to assume that the Adams estate had complied with the condition in the agreement of October, 1916, as to the making of an electrical contract. The Cohoes Company accepted the rent upon that implied representation. There was no consideration for the agreement, except the mutual promises. The Adams estate having failed to pay the rent for three years prior to the execution of the agreement there was the absolute right of re-entry under the terms of the instruments of 1849 and 1866 and under the authorities which have been reviewed by me. The Cohoes Company only agreed that it should not exercise that right for one year, upon certain conditions, failure to perform which permitted the Cohoes Company to demand a surrender and cancellation of the two indentures of lease, upon paying the sum of $1,400 and upon the waiver of all rents in arrears, to the Adams estate. The Adams estate failed to comply with their condition. There was no assumption of the obligation of this agreement in the

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transfer by the Adams estate to the plaintiff, and the plaintiff never did agree, either with Adams or the Cohoes Company, to sign a contract for the substitution of electric power for the six mill-power contained in the two indentures of lease recited in the agreement. The conditions, therefore, upon which the Cohoes Company agreed to waive the default in the payment of rent and to accept the purchase by the plaintiff of the interest of the Adams estate in the property, were not complied with, directly or indirectly. The waiver never was complete. The right of re-entry was to be waived and released only upon the terms stated in the agreement and as these terms were not complied with, the right of re-entry was never waived or released. Such right of re-entry existed on October 16, 1916, and has continued ever since and now exists because the condition upon which the company was to waive its right has never been complied with and it is now too late to comply with it and it was too late after October 16, 1917.

On the trial the defendant offered to pay into court the rent paid to it by Mr. Adams on October 13, 1917, and also the $1,400 provided for in the agreement, with interest on both sums.

Under section 1504 of the Code of Civil Procedure the defendant under the facts established here could maintain an action against the plaintiff when this action was brought, and under its counterclaim in this action it is entitled to judgment, cancelling and annulling the leases according to the terms and conditions of the October, 1916, agreement and restoring it to the possession of the demised premises.

The defendant is entitled to judgment dismissing the complaint and for affirmative judgment on its counterclaim in accordance with this decision, together with costs.

Judgment accordingly.

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Matter of the Application of CHARLES
Sheriff of the County of Seneca, N. Y.
of Mandamus to GEORGE T. PURCELL
Clerk of Said County.

(Supreme Court, Seneca Special Term, Mar

**Statutes — repeal of Laws of 1822, chap. 127, b**
**board of supervisors of Seneca county — j**
**County Law, § 12(14).**
**Mandamus — when motion for writ of, denied —**
**Seneca county — jurors.**

The board of supervisors of Seneca county h
tion 12(14) of the County Law had plenary po
resolution of August 30, 1920, abolishing the
tricts into which by chapter 127 of the Law
county was divided, and providing that therea
should consist of a single jury district.

*People* v. *Johnson*, 110 N. Y. 134, distinguis

The repeal of the said statute of 1822 was a
by the County Law but by the resolution o
supervisors on August 30, 1920, which has th
a statute passed by the legislature itself.

A writ of mandamus commanding the county
county to recognize as proper jurors those wh
drawn from the north district jury boxes, to
drawn from the combined ballots, and to keep ir
the ballots bearing the names of grand juro
jurors for the north and south districts, resp
denied.

APPLICATION for a writ of mandamus,
emptory or alternative, commanding the
county clerk, among other things, to use
term of the Supreme Court, to be held i
of Seneca on the first Monday of March, 1
lists of names of grand and trial jurors
may be drawn from the north jury dis

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county and to disregard the lists of jurors drawn from the entire county.

John M. Sutton, for applicant.

Harris, Beach, Harris & Matson (David C. Munson, of counsel), for county clerk.

William S. MacDonald, for board of supervisors of Seneca county.

STEPHENS, J. At the opening of the argument, the county clerk announced through his counsel that he is an indifferent party to the proceeding and would yield submissively without contention to whatever directions might be given in the premises.

The board of supervisors, however, appeared by counsel in defense of its action that has given cause for this controversy.

This application challenges the validity of a resolution of the board of supervisors of Seneca county passed August 30, 1920, abolishing the two jury districts into which the county was divided by chapter 127 of the Laws of 1822 and providing that thereafter the county shall consist of a single jury district; the resolution further provided for holding all trial terms of all courts of record at the courthouse in the village of Waterloo and a method by which the existing ballots of grand and trial jurors respectively of the two jury districts should be combined and that such jurors should thereafter be drawn from the entire body of the county.

Two lists of grand jurors and two lists of trial jurors to attend a term of the Supreme Court, appointed to be held at the courthouse in Waterloo on March 7, 1921, have been prepared by the county clerk; one list of grand jurors and one list of trial jurors

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consists of names drawn from the north jury district boxes, and another list of grand jurors and one of trial jurors consists of names drawn from the combined ballots of the two jury districts; it is the position of the applicant here that the persons whose names were drawn from the north jury district constitute the only legal grand and trial jury respectively.

It is necessary, therefore, to determine whether or not the board of supervisors had authority to consolidate the two existing jury districts into one and our inquiry leads to an examination into the origin of the two shire system that has prevailed in Seneca county for nearly a century and the sources of the power which the board of supervisors claim justly to have used in abrogating it.

The county of Seneca was carved out of the county of Cayuga by chapter 31 of the Laws of 1804 and it was enacted that the two terms of the Courts of Common Pleas and General Sessions of the Peace "shall be holden at the meeting house on lot number thirty in the Town of Ovid until further legislative aid in the premises." The sum of $1,000 was authorized to be raised by taxation to build a courthouse and jail within a specified area in the town of Ovid, and commissioners were named to superintend the building of them; the legislature in 1805 by chapter 132 of that year authorized the commissioners to place the buildings on any part of lot No. 3 not exceeding fifty rods west of the limits described in the former act, appropriated $1,000 additional for the purpose, and declared that it should be lawful for the above mentioned courts to adjourn the next term of court from the meeting house to the house of John Seely on lot No. 3; more moneys were later directed to be raised to complete the structures, $1,500 in 1806 and $2,000 in 1807 (Laws of 1806, chap. 146; Laws of 1807, chap. 142); by the latter act

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the number of terms of court was increased to three to be held "at the courthouse, in said county."

The Revised Laws of 1813, chapter 65, provides that the Courts of Common Pleas and General Sessions of the Peace should be held in the county of Seneca at the courthouse of said county on the second Tuesday of May and on the first Tuesday of October and February.

A courthouse and jail were authorized to be built in the village of Waterloo in the town of Junius by chapter 189 of the Laws of 1817; commissioners were appointed by that act to superintend the erection of the buildings and the board of supervisors was required to raise the sum of $4,000 for the enterprise; it was further enacted that when the courthouse was suitable for occupancy it should be the duty of the courts to adjourn from the courthouse at Ovid to the one in Waterloo, and that prisoners should be removed from the jail at the latter place to the new jail when ready and that the courthouse and jail so to be erected in the village of Waterloo should thenceforth be the courthouse and jail of the county of Seneca; the board of supervisors was authorized to dispose of the buildings at Ovid after the new ones had been constructed in Waterloo.

We come now to the consideration of the embarrassing statute, chapter 137 of the Laws of 1822.

It was provided in that act that the several courts thereafter to be held in Seneca county should be held alternately in the courthouse in the town of Ovid and the courthouse in the town of Junius and that there should be two jury districts in the county, the towns comprising each being named in the statute; it was further enacted that it shall not be lawful for the supervisors to sell the courthouse at Ovid or the lot on which it stands.

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Many of the statutes referred to have no very vital relation to our problem but have been mentioned in order to emphasize that we have thus far been dealing with the period in the history of the state when the legislature was concerned with the minute details of county government and regulation of county business; the exercise of these governmental functions was transferred from the state legislature to the local legislative bodies by the Constitution and appropriate legislation under it; by the Constitution of 1846, amended in 1874, the legislature was deprived of the power that it had theretofore exercised in this respect and it was prohibited from passing any private or local bill, "Locating or changing county seats," or "Selecting, drawing, summoning, or empaneling, grand or petit jurors." Const. 1846, as amd. 1874, art. III, § 18. In our present constitution the same provisions are found at the like numbered article and section.

When the right to regulate local municipal governments in certain specified particulars was taken away from the legislature by the constitutional provisions the same sovereign power that deprived it of that right imposed upon it the duty to confer upon the boards of supervisors of the several counties of the state, by general laws, such further powers of local legislation and administration as the legislature may from time to time prescribe or deem expedient. Const. 1846, art III, § 17; Amendt. 1874, art. III, § 23; Const. 1894, art. III, § 27.

Pursuant to the mandate of the Constitution the legislature has from time to time conferred such further powers upon the boards of supervisors; among other general powers thus conferred is that "To make one or more jury districts and to make such regulations in respect to the holding of terms of courts as

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shall be necessary by reason of such change." County Law, § 12, subd. 14.

The ancestry of the above quoted extract from the County Law can be briefly traced; the identical language makes its initial appearance in chapter 570, Laws of 1881, which act apparently contains the first definite authorization of boards of supervisors to fix the number of jury districts, and constitutes subdivision 14, section 12 of the County Law of 1892 (chap. 686); a portion of the quoted language " to make such regulations in respect to the holding of (the) terms of courts as shall be necessary by reason of such change " appears, however, in chapter 482, Laws of 1875, not in any relation to any change in jury districts but in relation to a change in the location of a county courthouse.

It is an interesting discovery that the legislature by chapters 132 and 374 of the Laws of 1881 changed the boundaries of the two jury districts in Steuben county as indicative of the practical interpretation placed by the legislature upon the constitutional barrier against local bills for that purpose and that later at the same session, chapter 570 was passed, conferring authority upon boards of supervisors to legislate in that particular.

It is immaterial, however, for our present purpose whether the right to make one or more jury districts in a county resides concurrently in the legislature and the several boards of supervisors or solely in the latter bodies, because of constitutional and legislative provisions; the board of supervisors of Seneca county has consolidated the former jury districts into one by appropriate legislation and its action must be respected, providing it had the requisite authority to do so.

The authority of the board of supervisors in this

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regard and the validity of their action is questioned solely upon the ground that the act of 1822 has never been repealed and is, therefore, yet controlling.

The counsel for the applicant concedes in his brief that if the act of 1821 had been or should be repealed by the legislature the board of supervisors would have had or would have ample authority for doing as it has done; the legislature has, however, conferred the power upon the board of supervisors "to make one or more jury districts;" it would not be claimed, successfully at any rate, if the legislature had the power and should exercise it doing precisely what the board of supervisors has done, that such action would not operate as a repeal of the statute of 1822; this is a necessary conclusion, otherwise the act of 1817 would still be operative for it too is unrepealed except by the circumstances that the act of 1822 is the later enactment covering the same subject. *Matter of Troy Press Co.*, 94 App. Div. 514; affd., without opinion, 179 N. Y. 529.

An act passed by the board of supervisors pursuant to authority delegated or conferred by the legislature has the same force as a statute passed by the legislature itself. *Village of Carthage* v. *Frederick*, 122 N. Y. 268; *Crayton* v. *Larabee*, 220 id. 493.

It seems to me of little importance, therefore, whether the legislation superseding the earlier statute was enacted by the legislature or by another legislative agency duly authorized to enact it.

The applicant invokes the familiar rule that a special law is not repealed by a general one; assuming for the moment that this rule is pertinent to our present inquiry, nevertheless, the ultimate test after all rules of statutory interpretation have been applied and to which all rules must yield is the legislative intent; the search for it leads below the surface of verbal expression and piercing all disguises goes straight to

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the purpose of the law makers, aided by formulated rules when they serve, bound by no rule that obstructs the discovery of the rational genuine intent of the legislature. *Matter of Dobson*, 146 N. Y. 357.

It is scarcely conceivable that the legislature after granting to the county legislative bodies authority to make jury districts intended that the statute of 1822 should retain its vitality; an examination of the legislation concerning kindred conditions in the county of Steuben lends support to this conclusion; in 1853 that county was divided into two jury districts (Laws of 1853, chap. 578) and in the following year courts were authorized to be held alternately in Bath and Corning (Laws of 1854, chap. 98); three separate acts were afterwards passed changing the boundaries of the jury districts (Laws of 1868, chap. 191; Laws of 1881, chaps. 132, 374); each of these acts, except the last one, was abrogated by the enactment of its successor; as above stated at the same session of the legislature, at which chapters 132 and 374 of the Laws of 1881 were passed, a general law was enacted giving power to boards of supervisors to make the jury districts; chapter 374 of the Laws of 1881 has never been otherwise repealed by the legislature; however, in 1904 the board of supervisors made three jury districts in the county instead of the two then existing; this action was under scrutiny in *Lyon* v. *Board of Supervisors*, 115 App. Div. 193, though the precise question presented here was not involved there, except incidentally.

We are not, however, required in the last analysis to regard or to disregard the rule to which reference has been made; the repeal of the act of 1822 was accomplished not by the general County Law but by the special law enacted by the board of supervisors.

I conclude, therefore, that the board of supervisors of Seneca county had plenary power to pass the enact-

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ment consolidating the two jury districts into one by virtue of section 12, subdivision 14, of the County Law.

There is nothing hostile to this conclusion in *People* v. *Johnson,* 110 N. Y. 134; at the time of that decision in 1888 the act of 1822 was still operative though the right to prescribe the number of jury districts resided in the county legislature but had not then been exercised.

The only other statutes to which my attention has been called or my own researches have disclosed relating to Seneca county and bearing upon this investigation but too remotely to merit more than a mention are Revised Statutes of 1829, part III, chapter I, title V, section 20, subdivision 40, as amended by chapter 65, Laws of 1852.

I am conscious that the decision rendered upon this application does not entirely clarify the situation, for the effect of this determination is simply a denial of a direction to the county clerk to recognize as proper jurors those whose names were drawn from the north jury district boxes, to cancel the lists drawn from the combined ballots, and to keep in separate boxes the ballots bearing the names of grand jurors and of trial jurors for the north and south districts respectively.

The application is denied.

Application denied.

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## Matter of the Estate of MARY B. CASH, Deceased.

(Surrogate's Court, New York County, March, 1921.)

**Transfer tax — when corporate trustee not exempt under section 221 of the Tax Law.**

The Title Guarantee and Trust Company is not in any sense or for any purpose a corporation belonging to any of the



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classes mentioned in section 221 of the Tax Law, and a bequest to said company, as trustee, to expend the income for an obviously educational and charitable purpose, is subject to a transfer tax.

APPEAL from an order fixing the transfer tax.

Harold Swain (Harold Swain, Benjamin G. Bain and Ellis G. Kinkead, of counsel), for executor.

Lafayette B. Gleason (Schuyler C. Carlton, of counsel), for state comptroller.

COHALAN, S. The executor of decedent's estate appeals from the order fixing the transfer tax on the ground that a tax has been assessed on the bequest of a portion of the residuary estate to the Title Guarantee and Trust Company, as trustee, to expend the income "in educating the poor but ambitious young men over the age of fourteen years in the City of New York, in any trade, which such men may desire to acquire, and who may be pursuing such trade education in the trade school located at First avenue, between Sixty-seventh and Sixty-eighth Streets, in the City of New York."

The purpose of the gift is obviously educational and charitable. Section 221 of the Tax Law grants exemptions from the tranfer tax to bequests to certain classes of corporations therein enumerated.

The character of a corporation is determined by its charter. *Matter of White,* 118 App. Div. 869. The articles of incorporation of the Title Guarantee and Trust Company, in so far as they are disclosed by the record, do not show that the company is in any sense or for any purpose a corporation belonging to any of the classes mentioned in section 221. In *Matter of Albright,* 93 Misc. Rep. 388; *Matter of Saunders,* 77

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id. 54, and *Matter of Guiteras,* 113 id. 196, relied on by the appellant, the transfers were to municipal corporations and were held to be exempt from the tax because the municipalities were authorized by their respective charters or acts incorporating them to receive and distribute funds for charitable and educational purposes and to exercise functions similar in character to those performed by purely educational and charitable corporations.

The right possessed by the company to act in a fiduciary capacity does not relieve bequests to it from the imposition of the tax. A corporate trustee is in no different situation in this respect than an individual trustee, a bequest to whom for charitable or educational purposes is subject to the transfer tax. *Matter of Robinson,* 80 Misc. Rep. 458; affd., 212 N. Y. 548.

The report of the appraiser is correct, and the order fixing tax is affirmed.

Order affirmed.

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## Matter of the Contested Probate of the Last Will and Testament of EUGENE TYMESON, Deceased.

(Surrogate's Court, Westchester County, March, 1921.)

**Verdict — when the court may direct a verdict upon a contested probate — Surrogates' Courts — trial — evidence — wills.**

It is only when a verdict rendered upon a contested probate must be set aside as unsupported by the evidence that the court may direct a verdict.

Where a will was executed under the supervision of a lawyer, the presumption is that the formalities of the Statute of Wills were complied with, and when the proof is ample to indicate due execution that issue may be taken from the jury and the surrogate may direct a verdict in favor of the will on that issue.

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Where the contestants failed to give evidence of direct pressure upon the testator or produce evidence which will support a verdict that the will was a product of undue influence, coercion, duress, fraud or restraint of any kind or character, the consideration of such issues will be withdrawn from the jury and a verdict directed in favor of the will.

Where the only inference to be drawn from all the evidence, by reasonably minded men, is that the testator when he made his will possessed the mental capacity required by law, no question of fact is left for the jury, and as it would have been the duty of the court to set aside a verdict against the will, as against the evidence, a verdict in favor of the will upon that issue will be directed.

DECISION on motion to direct a verdict.

Mott & McCreedy (Clarence Alexander, of counsel), for proponent.

Thomas J. O'Neill (J. Ambrose Goodwin, of counsel), for contestants.

SLATER, S. At the conclusion of the trial of this cause, the attorney for the proponent has made a motion that the court take the issues, as framed by an order of this court, from the jury and direct a verdict upon all the issues.

The burden at this time belongs alone to the surrogate. It is *only when a verdict* MUST *be set aside,* as unsupported by the evidence, and *not when it* MAY *be set aside* for that reason, when a verdict may be directed. The issues framed in this contest relate to the execution of the will of Eugene Tymeson; the want of testamentary capacity of the decedent; and undue influence exerted over the decedent. The will was executed under the supervision of a lawyer, and this alone affords a strong presumption that it was executed in compliance with the formal requirements of the statute. *Matter of Cottrell,* 95 N. Y. 329, 339; *Matter of Nelson,* 141 id. 152. In my judgment, there

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is ample proof upon the record to indicate due execution of the will by the formalities required under the law of wills of the state, and I take from the consideration of the jury this issue, and I direct a verdict upon this contention of the contestants in favor of the will.

*Another issue* is that of undue influence. Undue influence is an affirmative assault upon the validity of a will, and there must appear a moral coercion destructive of free agency. The elements of undue influence are motive, opportunity, and the act itself, and the exercise of the act upon the testator must be at the very testamentary act. Mere opportunity to exercise undue influence, standing alone, is not enough. *Cudney* v. *Cudney,* 68 N. Y. 148. No evidence is offered that it was the work of the chief beneficiary of the will. A will cannot be avoided because of the influence of another, unless it appears that the influence exerted was so potent at the time the will was made as to take away and overcome the power of the testator at that time to act freely and upon his own volition. The evidence adduced in support of undue influence fails to meet the requirements as laid down in *Matter of Caffrey,* 95 Misc. Rep. 466; *Matter of Powers,* 176 App. Div. 455; *Matter of Fleischmann,* 176 id. 785; *Matter of Ruef,* 180 id. 203; affd., 223 N. Y. 582; *Burke* v. *Burke,* 193 App. Div. 801; *Matter of Heaton,* 224 N. Y. 22; *Matter of Dunn,* 184 App. Div. 386.

The contestants have failed to show evidence of direct pressure upon the testator, or produce evidence which will support a verdict that the will was the *product* of undue influence, or coercion, or duress, or fraud, or force, or restraint of any kind or character. The burden of proof of undue influence is always upon the contestants, and never shifts. *Matter of Kindberg,* 207 N. Y. 220. The contestants have failed to sustain this burden. Testamentary gifts to paramours, or

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strangers to the blood do not *per se* create an invalid will, nor necessarily pre-suppose undue influence. *Scott* v. *Barker*, 129 App. Div. 241; *Matter of Eddy*, 41 Misc. Rep. 283; *Heyzer* v. *Morris*, 110 App. Div. 313; *Matter of Mondorf*, 110 N. Y. 450; *Matter of Powers, supra; Matter of Fleischmann, supra; Matter of Snelling*, 136 N. Y. 516; *Hagan* v. *Sone*, 174 id. 317, 323.

Influence which exists from affection, or desire to gratify, is not undue influence sufficient to invalidate a will.

I take from the consideration of the jury the issues of restraint and undue influence, and I direct a verdict upon these issues raised by the contestants in favor of the will.

*Another and vital issue* in this case is that of mental capacity of the testator. In order to make a proper will, it is necessary that the testator should have testamentary capacity. It is essential that the testator have sufficient mental capacity to comprehend perfectly the condition of his property as relates to the persons who were, or ought, or might have been the objects of his bounty, and the scope and bearing of the provisions of his will. He must, in the language of the law, have sufficient active memory to collect in his mind, without prompting, the business to be transacted. The test is: Was testator's mind capable of understanding the nature and disposition of his property, and his relations with his relatives? If the testator has this, upon the *date he made his will*, he is a person of sound mind and memory, within the meaning and intent of the Statute of Wills. Code Civ. Pro. § 2614; *Delafield* v. *Parish*, 25 N. Y. 9; *Matter of Lawrence*, 48 App. Div. 83; *Matter of Snelling*, 136 N. Y. 515. Less mental faculty is required to execute a will than to enter into any other legal instrument.

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*Matter of Moyer,* 97 Misc. Rep. 512, 531. In a case free from undue influence, not a very high degree of mentality is required to make a valid will. *Matter of Strong,* 179 App. Div. 539.

The testator's property was his own. Under our system of law, he had the power to do with it as he chose. The law does not constrain a testator to be just, or to recognize natural claims upon his bounty. So long as the will is his own and not another's, it must stand, if he is *competent to make it. Dobie* v. *Armstrong,* 160 N. Y. 584, 593; *Matter of Huber,* 103 Misc. Rep. 599, 611, 612; *Smith* v. *Keller,* 205 N. Y. 39.

The holding of delusions does not in and of itself constitute testamentary incapacity. There may coexist delusion and a disposing mind. A delusion affects testamentary capacity *only* when it enters into and controls in some degree its exercise, and to invalidate a will, it must be shown that the will was the result of the delusion. *Heaton's Will,* 224 N. Y. 22, 29.

There is no presumption against the validity of a will because the will was made by a person of advanced years and in enfeebled condition of body and mind. Attempted suicide does not of itself raise a presumption of lack of mental capacity. Evidence produced by contestants of moral depravity, or moral insanity does not constitute legal incapacity or legal insanity. It may be classed as relaxation to mental effort. Proof of moral depravity does not establish a lack of intellectual ability. The law does not require any particular grade of moral rectitude as an element of testamentary capacity. *Matter of Forman,* 54 Barb. 274; *Matter of Jones,* 5 Misc. Rep. 199; 1 Jarman Wills, 75. Ill health is not of itself evidence of want of testamentary capacity. Eccentricity, even gross eccentricity, slovenliness in dress, peculiarities of speech and manner are not facts sufficient to disqualify a person from

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making a valid will. *Matter of Schober,* 90 Misc. Rep. 230; *Matter of Cutter,* 175 App. Div. 647; retrial, 100 Misc. Rep. 130.

Where upon consideration of the entire evidence of the case, *reasonable men might draw different inferences, then,* and *only then,* a question of fact is presented, which the court should submit to the jury. Whether this issue of mental capacity should be submitted to the jury is to be further tested as follows: If in the opinion of the surrogate he should have to set aside the verdict of the jury, as against the weight of evidence, if given against the will, then he should not submit the issue to the jury.

Proof of the evidence of undue influence always presupposes that mental capacity exists. *Matter of Dunn,* 184 App. Div. 386. Proof of the ability to perform, in a satisfactory manner, a person's usual toil, pre-supposes that mental capacity exists, sufficient to make a valid will, even though that person suffers from progressive arterio-scelerosis.

The testamentary capacity of the decedent, evidenced by the exercise of his sensitive creative intellect, and recognized genius; his rationality in the original conception of ideas, resulting in the almost human functioning of mechanical inventions, automatically performing intricate tasks, in tireless repetition, being useful, valuable, and absorbed in a great manufacturing plant, prior to, near, and subsequent to the date of the will; and as further evidenced by his habits, acts and speech, all testified to by the witnesses for the will, oppose, and are in contradiction to the existence of arterio-sclerotic insanity on October 4, 1918.

These two opposite forces and conditions — one the vital organism which propels normally the human mind — the other the destructive condition which scle-

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rotic insanity causes — *do not* exist in the *same brain,* at the *same time.* Sclerotic insanity may exist in an individual, and destroy the mental power to develop those things which the decedent created. But, the mental labor performed by the decedent as stated above, *disproves* and confutes the testimony that sclerotic insanity existed in his case on October 4, 1918.

Testamentary capacity and sound mind as defined by the law, not medical soundness of mind, governs regarding wills. The legal test of sanity is that the acts and conduct of the person whose sanity is under investigation shall correspond with the acts and conduct of the *person himself* at the time when he is proved to have been in health and sound mind. The eccentricities and conduct of the testator at the time he made his will were normal to the man himself for over thirty-five years, according to the testimony.

In my opinion, different inferences *cannot fairly be drawn* by reasonable men from the character of the evidence offered on this trial, upon the issue of the mental capacity of the testator. The only inference to be drawn by reasonably minded men from all the evidence is *that the testator possessed the mental capacity required by law* to make a valid will on October 4, 1918. In my judgment, no question of fact is presented for the jury.

Consequently, evidence which is not sufficient to support a verdict is in the eye of the law no evidence, and, when it is said that there is no evidence to go to a jury, it is not meant literally "none," but that there is none that ought reasonably to satisfy a jury that the fact sought to be proved is established. *Matter of Case,* 214 N. Y. 199; *Getty* v. *Williams Silver Co.,* 221 id. 34, 39; *Matter of Huber,* 103 Misc. Rep. 608; *Matter of Dorsey,* 94 id. 566, 577.

*Matter of Ruef,* 180 App. Div. 203, 207; affd., 223

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N. Y. 582, is the law of this department and the state upon this question. The court held: "If the evidence is not sufficient to support a verdict, it is 'in the eye of the law no evidence,' and should not be submitted to a jury," quoting *Matter of Case, supra.* This accords with the trend of recent decisions. The following cases support this principle and the test above indicated; *Matter of Cutter,* 100 Misc. Rep. 130; *Matter of Kennedy,* 106 id. 216; *Matter of Hall,* 193 App. Div. 362; *Matter of Woods,* 189 id. 324; *Ivison* v. *Ivison,* 80 id. 599; *Burke* v. *Burke,* 193 id. 801; *Lester* v. *Lester,* 178 id. 438; *Matter of Brand,* 185 id. 134; affd., 227 N. Y. 630; *Matter of Fleischmann,* 176 App. Div. 785; *Matter of Dunn,* 184 id. 386; *Matter of Kennedy,* 186 id. 19, 190 id. 896; affd., 229 N. Y. 567; *Matter of Goodheart,* 173 App. Div. 256; *Matter of Sullivan,* 229 N. Y. 440; *King's Will,* 172 N. Y. Supp. 870; *Dobie* v. *Armstrong,* 160 N. Y. 584; *Matter of McGill,* 229 id. 405, 410; *Estate of O'Brien,* N. Y. L. J., Dec. 29, 1920.

Had I left the matter to the jury and had they found against the will, the verdict must have been set aside, in my judgment, as against the weight of evidence. The burden of proof of mental capacity, which rests upon the proponent, has been sustained. After mature deliberation, I feel it my duty and judicial obligation to refrain from submitting this issue to the jury. I direct a verdict upon this issue raised by the contestants in favor of the will.

**Probate decreed.**

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# THE PEOPLE ex rel. KNUT HULTMAN et al., Relators, *v.* JOHN F. GILCHRIST, as Commissioner of the Department of Licenses of the City of New York, Respondent. THE TWENTIETH CENTURY BROWN & WHITE TAXICAB ASSOCIATION, INC.

(Supreme Court, New York Special Term, March, 1921.)

**Mandamus — who entitled to a peremptory writ of — licenses — taxicabs — trade marks — injunctions — Code of Ordinances of city of New York, art. 8, chap. 14.**

While mandamus will not lie to compel a public officer to exercise a discretionary power, yet if his action in a given matter is in a legal sense arbitrary, tyrannical or unreasonable, or is based upon false information, the relator may have a remedy to right the wrong which he has suffered. (P. 658.)

The provisions of article 8, chapter 14, of the Code of Ordinances of the city of New York not only indicate with accuracy the function of the commissioner of the department of licenses in regard to the issuance of licenses to operate taxicabs as public hacks for hire, but also suggest the reasonable limitations thereon to be the ascertainment of the safety and fitness of cab and driver. (P. 654.)

Whether vehicles infringe upon patents or trade marks or involve possibilities of unfair competition with other instrumentalities of transportation is entirely outside of the purview of the commissioner's duties. (Id.)

To a petition for a writ of mandamus to compel the commissioner of the department of licenses of the city of New York to issue to relators licenses to operate their taxicabs as public hacks for hire, he made a return that having learned that the courts had established for the "Twentieth Century Brown & White Taxicab Association, Inc." the right to use the colors brown and white in a particular combination and scheme, he had, in view of the facts and adjudications, and actuated solely by a sense of public duty, refused to issue licenses to others operating brown and white taxicabs, in the interest of and to conserve the public welfare, and to protect the public against the deception arising out of such simulation. *Held*, that it

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being quite apparent that the adjudications in the actions which terminated in injunctions in favor of the said association, did not establish its right to the combination of brown and white colors, except against the particular defendants in those suits, the statements in the return to the petition for the writ indicated a radical misconception of the significance of said adjudications. (P. 655.)

The decision of said commissioner refusing to grant taxicab licenses to relators was based solely on the adjudications in favor of the Brown & White Association. There was no pretense that the public is otherwise injured by the competition of relators and the various affidavits indicated that the brown and white color is understood by the public to mean that cabs so painted charge a lower rate than ordinary cabs. *Held,* that the relators who charge such lower rates were entitled to a peremptory writ as applied for.

*People ex rel. Duffy* v. *Gilchrist,* 190 App. Div. 898, distinguished.

Application for a writ of mandamus.

House, Grossman & Vorhaus, for relators.

John P. O'Brien, corporation counsel of city of New York, for respondent.

Phillips, Mahoney & Liebell (Warren C. Fielding, of counsel), for intervenor.

Bijur, J. This is a petition for a writ of mandamus directed to respondent as commissioner of the department of licenses requiring him to issue licenses (under the provisions of article 8, chapter 14, of the Code of Ordinances of the city of New York) to relators to ply their taxicabs for the year 1921 as public hacks for hire upon the streets of New York. There is no dispute as to material facts. Respondent's return recites: "Heretofore, some time in January, 1921, the Twentieth Century Brown & White Taxi-

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cab Association, Inc., represented to me that they had established their right to use the colors brown and white in the particular combination and scheme in which the public hacks operated by them are painted by adjudications in the Supreme Court of the First Department in several cases. The facts, substantially as set forth in the affidavit of Warren C. Fielding, annexed hereto as a part of the opposing papers herein, with respect to the procurement of injunctions by said association, and the grounds upon which such injunctions were procured, were presented to me by the said association. I concluded that it was in the interest of the public welfare, in view of those facts and adjudications, to refuse to issue licenses to hacks painted brown and white in simulation of the color scheme and combination of the hacks of the Twentieth Century Brown & White Taxicab Association, Inc. I therefore directed the chief of the division of licensed vehicles to carry out that determination and to refuse to issue licenses to hacks which in color combination simulated the hacks of the said association, in order to conserve the public welfare and to protect the public against the deception arising out of such simulation." The first question which presents itself is as to the power of the commissioner in the premises. The appropriate ordinance (art. 8, chap. 1) provides in section 83 " that no public hack shall ply for hire upon the streets of the city without first obtaining a license from the commissioner," and in section 84 that " no vehicle shall be licensed until it has been thoroughly and carefully inspected and examined and found to be in thoroughly safe condition for the transportation of passengers — clean, fit, of good appearance and well painted and varnished. The commissioner shall make * * * such examination and inspection before issuing a license.

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The commissioner shall refuse a license to * * * any vehicle found by him to be unfit for public patronage." There is a further requirement for the examination of taximeters. Under section 88 he is required to " maintain constant vigilance over all public hacks to see that they are kept in a condition of continued fitness for public use." Section 89 provides that licenses may be revoked " if the vehicle shall not be in good condition and appearance, clean and safe." Section 90 provides for a driver's license, which is limited to persons of good physical condition, necessary education, sobriety and good character. Section 91 requires an examination of the driver's " knowledge of the provisions of this article, the traffic regulations and the geography of the city " as well as a demonstration of the applicant's " skill and ability to safely handle his vehicle." These provisions indicate with accuracy the function of the commissioner and suggest the reasonable limitations thereon to be the ascertainment of the safety and fitness of cab and driver. As matter of common knowledge, unaided even by the precise provisions of the ordinances, I should be of opinion that the question whether vehicles infringe upon patents or trade marks or involve possibilities of unfair competition with other instrumentalities of transportation is entirely outside of the purview of the commissioner's duties. This is confirmed by even a cursory examination of the other subjects of license placed under respondent's control. There is a general provision in article 1 of this chapter listing the businesses or occupations required to be licensed, which, in alphabetical order, run from " billiard and pool tables " through " hand organs " to " weighers of hay." There are also a number of special enactments like those (chap. 3) relating to licenses for amusements and exhibitions. It requires

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little stretch of the imagination to foresee the extent of the commissioner's activities and the far-reaching results of their exercise if he should undertake to make the enjoyment of a license by a theatre or public exhibition depend upon his opinion whether the whole or a part of the building, the apparatus or the performance involved infringements on patents, copyrights, trade marks or other similar private interests. I doubt, indeed, whether respondent would consciously undertake to decide such issues of law and fact. I understand his position in the present litigation as expressed in his return to be that having learned that the courts had "established" for the Brown & White Association the "right to use the colors brown and white in the particular combination," he has, "*in view of these facts and adjudications,*" declined to issue licenses to others operating similar brown and white taxicabs "in the interest of the *public welfare,*" and "to conserve the public welfare and to protect the public against the deception arising out of such simulation." These statements, however, of themselves, indicate a radical misconception of the significance of the adjudications on which he relies. In the first place, it is quite apparent that in the three actions which have terminated in injunctions in favor of the association the adjudication did not "establish the right" of the association to the combination of brown and white colors, except, and this is the vital point, *as against the particular defendants in those suits.* In the second place, respondent has equally misapprehended the meaning of those decisions in respect of the public welfare. It frequently happens that the public is mentioned in cases involving unfair competition. The adjudication, however, is not intended to safeguard the public welfare, but only the interests of the complainants. The subject is happily expounded

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in *American Washboard Co.* v. *Saginaw Co.*, 103 Fed. Repr. 281, 285. The court there says: "The theory of the case seems to be that complainant, manufacturing a genuine aluminum board, has a right to enjoin others from branding any board 'Aluminum' not so in fact, although there is no attempt on the part of such wrongdoer to impose upon the public the belief that the goods thus manufactured are the goods of complainant. We are not referred to any case going to the length required to support such a bill. It loses sight of the thoroughly established principle that the private right of action in such cases is not based upon fraud or imposition upon the public, but is maintained solely for the protection of the property rights of the complainant." In *Holbrook* v. *Nesbitt*, 163 Mass. 120, 125, the decision reads: "To avoid misapprehension, it may be well to state that the court does not interfere to prevent the public from being misled, but 'for the purpose of protecting the owner of a trade or business from a fraudulent invasion of that business by somebody else' (*Levy* v. *Walker*, 10 Ch. D. 436, 448)." See, also, *Kentucky Distilleries, etc.*, v. *Wathen*, 110 Fed. Repr. 641, 645; *Munro* v. *Tousey*, 129 N. Y. 38, 41, 42; *Amoskeag Mfg. Co.* v. *Spear*, 2 Sandf. 599, 605, 606. It will thus be seen that in actions for the protection of a distinctive mark in trade the possible deception of the public is considered solely because of its effect upon the trade of the complainant. To the extent that the public is deceived the trade of the complainant is diminished. The deception referred to, however, is as to the identification of the article offered by the defendant with that offered by the complainant. Whether the public be benefited or injured by the deception is not the concern of the court; consequently the public welfare, as distinguished from deception of the public, is not involved. An injunc-

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tion would issue none the less if it appeared that the defendant's goods were better and cheaper than the complainant's; it would not be refused merely because defendant's goods were inferior and dearer. The suit is designed to prevent an invasion of the private interest of the plaintiff. If that be established the defendant cannot avoid an unfavorable judgment by showing merely that if he be permitted to continue the private wrong the public will get better or cheaper goods. The respondent with commendable frankness bases his decision solely on the adjudications heretofore rendered. There is no pretense that the public is otherwise injured by the competition of relators. Indeed, the various affidavits indicate that the brown and white color is understood by the public to mean that cabs so painted charge a somewhat lower rate than ordinary cabs, and the relators, together with those affiants who support their position, show that they charge such rates. Moreover, one of the affiants asserts that he and his cab have been examined and inspected, respectively, and approved, but that this license was refused on the grounds here at issue. This analysis demonstrates that the adjudications upon which alone respondent's ruling is based decide neither that the association has "established" its exclusive right to the combination of the brown and white colors, nor that the "public welfare" is affected by an imitation thereof by relators. It may not be amiss to point out that this misapprehension by respondent of the significance of the adjudications emphasizes the danger of permitting an administrative officer to undertake the delicate task of interpreting judicial decisions and of administering an executive office in a manner to virtually supplant the administration of justice as maintained in our system of government. It enables us also to draw a determinative



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line of demarcation between the functions of the commissioner of licenses and those of the courts. I am quite clear, and I understand it not even to be questioned, that the respondent has acted in the best of faith actuated solely by his sense of public duty. His ruling, however, is in a legal sense and, as that term is used in the decisions, "arbitrary." It is also "based on false information." It is elementary "that mandamus will not lie to compel the performance of a power the exercise of which lies in the discretion of the officer against whom the writ is sought." If, however, his "action is *arbitrary,* tyrannical or unreasonable, *or is based upon false information,* the relator may have a remedy to right the wrong which he has suffered." See *People ex rel. Empire City Trotting Club* v. *State Racing Comm.,* 190 N. Y. 31, 33, 34; also *Matter of Ormsby* v. *Bell,* 218 id. 213, 216; *Message Photo Play Co., Inc.,* v. *Bell,* 179 App. Div. 13, 19, 20. It is arbitrary in one of the senses defined by Webster, *i. e.,* as "not governed by any fixed rules or standard," and it is based not merely "on false information," but actually on reasons which, as I have shown, do not as matter of law and fact exist. It remains to consider a further important point urged by respondent, namely, that the decision in *People ex rel. Duffy* v. *Gilchrist,* N. Y. L. J., Aug. 16, 1919; affd. without opinion by the Appellate Division in 190 App. Div. 898, is determinative against the present application. That was indeed a petition for a writ of mandamus presented under similar circumstances, except that it involved the colors black and white and the Black & White Cab Co., Inc. But while the circumstances were similar, the petition was altogether different. I have been favored with the record in that case and it appears therefrom that the relator Duffy neither presented nor suggested any fact or

reason why his position differed in any respect from that of the defendants in the several injunction proceedings which had theretofore terminated adversely to a number of defendants sued by the Black & White Company. It is well settled that the "exercise of the jurisdiction to grant mandamus rests in the sound discretion of the court." High Ex. Leg. Rem. § 9; *People ex rel. Durant Land Imp. Co.* v. *Jerolman,* 139 N. Y. 14, 17; *People ex rel. Wood* v. *Assessors,* 137 id. 201, 204; *People ex rel. Ajas* v. *Board of Education,* 104 App. Div. 162, 164. The question, therefore, presented for adjudication in the *Duffy* case was not merely whether the commissioner of licenses had acted "arbitrarily" in refusing licenses to all drivers of black and white taxicabs other than those of the company, *but whether the court should exercise its discretion* to issue this extraordinary writ to the relator *in that case.* It was certainly a sound basis for the denial of Duffy's petition that upon his own showing the relief he sought would have been futile. To put the matter in a form more familiar to the lawyer, and quoting again from Mr. High: "The person seeking relief must show a clear legal right to have the thing sought by it (the writ) done." What clear legal right did Duffy disclose when he practically conceded that his case differed in no respect from those in which adjudications had already been rendered against the right to use taxicabs similar to the one for which he sought a license? In the instant case, however, relators have submitted among others an affidavit of one Pittsburg, which recites that he was one of the six organizers of the Brown & White Association in January, 1918, as well as of its predecessor; that originally the members had used the colors black and white, but later adopted brown and white; that at that time there were on the streets hun-

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dreds of brown and white taxicabs not connected with the association; that the only distinguishing mark which the organization intended to utilize was the diamond monogram on its door and on the rear, and that the brown and white colors were adopted merely for the purpose of indicating taxicabs whose rates were somewhat lower than those ordinarily charged. One Repperger affirms in another affidavit that he has operated a brown and white taxicab considerably over three years. It is quite clear that if relators are able on a trial to establish these facts, now sworn to before me, they would have — I shall not say a good defense, but at least a highly defensible position against any attempt to enforce as against them the right on the part of the Brown & White Association to the exclusive use of the combination of those colors. Their contention in these respects (even apart from the further suggestion in the moving papers and on the argument of possible collusion in the obtaining of the previous injunctions) would call for the careful and painstaking consideration of the courts, to whose determination of their property rights they are entitled by our Constitution. Yet, unless the relief which they now seek be granted, they will have been finally deprived of those rights by mere administrative fiat. It is true that affidavits submitted on behalf of the Brown & White Association as "intervenor" in the instant proceeding take issue with the allegations in the affidavit of Pittsburg and in those of other affiants on behalf of the relators. The issues so raised, however, involve questions which must be determined in the regular way, and with due consideration of the fact that in the appropriate litigation the burden of establishing the material facts will rest upon the association and not upon the present relators as defendants in such litigation. This, by the way,

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illustrates further the injustice and
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remedies. It certainly affords no gr
doning our system of administration
having recourse to arbitrary administ
not authorized by Constitution or
relators' case as presented to me no
that embodied in the moving papers in
I should not hesitate, notwithstanding
of the limited function and duties of
yield to the authority of that decisio
ever, the case here presented differs
case in the vital and determinative r
have pointed out, I am of opinion th
are entitled to a peremptory writ.

Ordered accordingly.

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# PRE' CATELAN, INC., Plaintiff, v. INTERNATIONAL FEDERATION OF WORKERS IN THE HOTEL, RESTAURANT, LUNCH ROOM, CLUB, AND CATERING INDUSTRY, and "LOUIS" MERLEN, the First Name "Louis" Being Fictitious, the Real Name Being Unknown to Plaintiff, Individually and as Secretary and Treasurer of International Federation of Workers in the Hotel, Restaurant, Lunch Room, Club and Catering Industry, Defendants.

(Supreme Court, New York Special Term, March, 1921.)

**Picketing — right to picket — strikes — labor unions — injunctions.**

**Injunctions — when motion to continue injunction pendente lite granted — labor unions — picketing — restaurant keepers.**

The fundamental thought underlying the judicial decisions by which solely the right to picket was created, was and is that the grant of such right was in furtherance, not of a greater liberty to be exercised by employees out on strike, but for their betterment, if such result could be brought about. It was never intended that the laws of the land should yield in the exercise of the right to picket. (Pp. 668, 669.)

The right to picket, even in an orderly and quiet manner, does not carry with it the privilege of destruction as a means to an end; nor does it, even inferentially, confer the right to unlawfully coerce or oppress. (P. 669.)

Picketing unaccompanied by threats and intimidation is a useless weapon; its effectiveness and its very essence is in the terror it incites. (Id.)

Plaintiff, engaged in the restaurant business and employing approximately a hundred persons in different capacities, has always maintained an "open shop" and has never discriminated against union labor. While its restaurant about ten P. M. was crowded with patrons, who though they had given their orders had not been served, all the waiters without cause or grievance suddenly, without warning or notice, walked out, and on the following day began picketing in front of plaintiff's place of business in squads of from two to fifteen per-

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sons, each carrying a sign which read "Workers of Pre' Catelan on strike for better conditions." It appeared by affidavits that as part of a scheme to injure and demoralize plaintiff's business and to produce fear on the part of its employees, some of them were subjected to aggravated assaults and threatened that if they did not cease working for plaintiff and join the union harm would follow; that there were threats of injury to patrons; that in order to protect its employees from harm plaintiff was put to the necessity of carrying them to and from work in taxicabs. It also appeared that agents of defendant, the International Federation of Workers in the hotel, restaurant, etc., industry, had entered plaintiff's premises, blocking the entrance thereto, and had used indecent language to its employees, interfered with them in the discharge of their duties, and followed them to their homes. *Held,* that a motion to continue an injunction *pendente lite* will be granted. (Pp. 663–664, 672.)

MOTION to continue an injunction *pendente lite.*

Harry W. Newburger, for plaintiff.

William Karlin, for defendants.

ERLANGER, J. The moving papers show that plaintiff is engaged in the restaurant business in which it has invested upwards of $100,000. Its rent is about $25,000 yearly; it employs approximately 100 persons in different capacities, among them a large number of waiters; that it has always maintained an "open shop" and never discriminated against union labor; that the head waiter hired the employees. On February 13, 1921, at about ten P. M. while the restaurant was crowded with patrons who had given their orders but had not yet been served, all the waiters without cause or grievance therefor suddenly and without warning or notice walked out and on the following day began picketing in front of its place of business in groups or squads consisting of from two to fifteen persons; that the latter carry upon their

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person a sign which reads "Workers of Pre' Catelan on strike for better conditions," and then there is recited a series of acts of violence and intimidation against its employees and intended patrons so shocking that one is almost stunned at the thought that such occurrences are possible in a civilized country. It is shown that one of the employees is in the Roosevelt Hospital suffering from a fractured nose, blackened eyes and lacerations of the face; that his assailant was arrested and held to bail; that another was attacked almost in front of plaintiff's premises and beaten about the head and face nearly into unconsciousness; that another was kicked in the head and face and is confined to his home as the result of his injuries; that another was knocked down by persons jumping from a taxicab who beat up his head and face and who has since been confined to his home by reason of the assault; that others were called vile names; that a number of patrons have been threatened by the sign bearers with bodily harm if they continued to patronize plaintiff; that other patrons were told that the place was disorderly and was to be raided; that the employees were threatened with harm if they did not quit working for the plaintiff; that the patrolling is for the purpose of intimidating its employees and to induce them to join the union; that agents of the defendants have entered plaintiff's premises and used indecent language to its employees and interfered with them in the discharge of their duties; that the entrance to its premises was blocked, its employees followed to their homes, all which is a part of a scheme to injure and demoralize plaintiff's business and to produce fear on the part of its employees; that the pickets are on duty from eleven A. M. to one A. M.; that to protect its employees they are carried back and forth in taxicabs. The defend-

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ants make a sweeping denial of all the charges so made against them. In the opposing papers a history is given of conditions existing in the hotel and restaurant industry showing how bad they were before the association defendant was formed, and the improvement that has taken place from that time on as to wages, hours of work and living conditions; that in 1918 the union presented demands to the plaintiff as to wages, hours of labor and reduction of working days from seven to six and an amicable settlement was attempted, and this being refused a strike was called by the union which lasted only a few hours and finally the demands were granted. Since then and for over two years the relations between plaintiff and the union have been amicable and so continued for over two years. As a result of the agreement the union was permitted by plaintiff to appoint one of its employees as a shop representative whose duty it was to see that the rules of the union and the agreement were enforced. Only members of the union were to be employed; that no employee was to be discharged except for reasonable cause, and in the event of an indiscriminate discharge upon investigation of the union the employee was to be reinstated; that all of plaintiff's employees were members of the union for about three years; that on the day following the strike, defendant's secretary called on plaintiff's secretary and offered to bring about an amicable settlement of the strike; that the former advised the latter that the union had secured information that the plaintiff had employed a crew of non-union men to take the place of the union employees, and if plaintiff would relinquish its plans against the union employees the matter could be settled immediately; that to this a threat to kill was made and that the union would be shot to pieces and smashed if it insisted on main-

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taining jurisdiction over plaintiff's place; that all efforts to settle failed; that the cause of the strike was brought about by the employees being informed that it was plaintiff's intention to destroy the organization of its employees and to retain in its employ only such as were willing to give up their union membership; that on the thirteenth day of February a full crew of non-union men was hired and the union employees discharged; that the waiters were "locked out" without any previous notice to them and as a result went on strike; that the pickets were instructed to commit no act of violence or breach of the peace; that no more than two pickets were at any time in front of the premises; that customers were never threatened and no attacks were made by the pickets; that no disorderly act occurred since the strike began; that the relation between plaintiff's customers and the former employees was amicable "and for that reason it must be admitted that perhaps due to the existence of the present strike the plaintiff's place of business might have suffered somewhat, but this is not due to any threats made by the pickets, but to the sympathy of the dining public with the cause of the employees;" that no employees of plaintiff were followed; no taxicabs used, but it is admitted "that some of the strong arm men hired by the plaintiff carried the employees of plaintiff to and from their place of business in taxicabs and these were the only taxicabs used in connection with the strike;" that plaintiff from the beginning of the picketing always had an officer in front of its place and hired men "who are very tough in appearance" who sought quarrels with the pickets. In fine, the contention is that the acts of the pickets were at all times peaceful, and the assaults, if committed, and other disturbances, were the acts of strangers. The affidavit in reply

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denies that plaintiff ever had anything but an open shop; that it never had any contract with the union containing any definite conditions; denies any discrimination; that its present employees are non-union men; denies the hiring of any guards or toughs; denies police protection; denies that any threat was made to destroy the organization of its employees; denies any threats to discharge the waiters; that no dispute was ever had with them; that their leaving was a surprise and that it had no prior knowledge of any reason for their action; denies the employment of a crew of non-union men on the thirteenth day of February as claimed, but admits that a new crew was employed within twenty-four hours after the waiters walked out, etc. The foregoing are the salient points which the papers on both sides exhibit and they show how sharp the conflict is on this motion. If mere denials were controlling on applications for injunctions, that writ would seldom issue. It never issues as a matter of course. But a court of equity will not withhold its power in that regard when a *prima facie* case is presented and the exigencies of the situation warrant its action. In the case of *Skolny* v. *Hillman,* 114 Misc. Rep. 571, I said among other things: "It is clearly established that picketing is lawful; that a man may work or not as he shall choose; that he may strike with others and peaceably seek others to join. But it is equally well settled that a worker may work wheresoever it pleases him; that he may labor and provide for himself and family without being subjected to the danger of assault or threat of bodily harm; that he cannot be compelled to join a union if he is not disposed so to do; that employees may not be enticed from their employment by threats or otherwise." Many of the features in the cited case are present here. Plaintiff insists on an "open

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shop." The defendants on the other hand want it unionized so that none but union men shall be employed. They are fighting not only for what is known as the "closed shop" which excludes all workers not members of the union, but also to maintain in plaintiff's business a "shop representative" whose duty it is to see that union rules are enforced and that no one is discharged except for reasonable cause, of which the union is to be the sole judge. That such is their contention is fairly to be inferred from the proof before me. And this, it is plaintiff's claim, is the origin of the trouble. Whether the waiters left voluntarily or were locked out, does not confer upon them the right to injure or destroy. If causelessly discharged, the courts afford them a proper remedy. If to strike and picket means that employers must through violence, intimidation and threats of destruction of their business yield to the demands which they, the strikers, through their union, shall see fit to impose, that is a direct challenge to existing laws and defies the basic principle of freedom of action, on which our form of government rests. When I said in the cited case that strikes and picketing were lawful, I meant of course those conducted by lawful means. The fact must not be lost sight of, that the right to picket, which is regarded in the eyes of the union as a sacred one, was created by the courts, and solely by them, and it is that tribunal which must correct abuses, if any arise under the determinations made by them. The fundamental thought underlying such decisions no doubt was, and is, that the grant of such right was in furtherance, not of a greater liberty to be exercised by them, but for the betterment of the worker if such result could be brought about, and to this central idea no one can or will find fault. But it was never intended that the

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laws of the land shall yield in the performance of that privilege. No court, I venture to say, ever imagined that their declarations of the right to picket would ever be construed to mean that it carried with it the right to inaugurate a reign of terror on either a small or large scale, or if not that, that other members of the public through sympathy may introduce the rule of the mob. To strike and to picket are terms which comprehend much. But there is a vast difference between those terms and license. The prerogative to picket even in an orderly and quiet manner does not carry with it the privilege of destruction as a means to an end. Nor does it even inferentially confer the right to unlawfully coerce or oppress. Picketing unaccompanied by threats and intimidation is a useless weapon. Its effectiveness and its very essence is in the terror that it excites. If done peaceably it would be futile. It follows then that the fear, if not the terror that the picketing carries with it, is the keystone of the arch and the potential element to the success of the cause. We have here established assaults of an aggravated nature; threats to employees if they did not cease working for plaintiff harm would follow; threats of injury to patrons; the necessity of carrying the employees back and forth in taxicabs to protect them from harm. Are all these charges mere fables? Were the assaults and injuries self-inflicted? Is the use of taxicabs to carry the employees back and forth merely a whim? Are employees to be coerced and oppressed by threats of injury and held remediless because forsooth the charges are denied? Is the state to be held so weak that it cannot protect those who desire to work but are fearful of the result if they do? Is a worker to be deprived of the right to live even though he is willing to work for a wage acceptable to him? Or forced to

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join a union against his will? If these things are permitted and the courts are to be held powerless to protect the weak against the strong, then the law is a mockery. If the claim that ours is a government of laws and not of men is to be upheld, conduct of the kind set forth in the moving papers must be dealt with, and I can find no better expression in that connection to convey the thought in my mind than that used by the court in the case of *Curran* v. *Galen,* 152 N. Y. 33–37, where it was said: "Every citizen is deeply interested in the strict maintenance of the constitutional right freely to pursue a lawful avocation, under conditions equal as to all, and to enjoy the fruits of his labor, without the imposition of any conditions not required for the general welfare of the community. The candid mind should shrink from the results of the operation of the principle contended for here; for there would certainly be a compulsion, or a fettering, of the individual, glaringly at variance with that freedom in the pursuit of happiness, which is believed to be guaranteed to all by the provisions of the fundamental law of the state."

I am not unmindful of the rulings of the courts of our state on the subject of strikes and picketing. They exist in abundance, but in none that have been examined by me were the acts chargeable to the defendants here ever sanctioned. The terms, *threats, coercion, oppression, intimidation,* and perhaps others, have all been passed upon. It is known that a strike to coerce an employer to discharge non-union men has been held by our courts to be lawful. They have gone so far as to say that employees may dictate to employers how their business shall be conducted and whom they shall employ (*National Protective Association* v. *Cumming,* 170 N. Y. 315–324), and that the employees "have the moral and legal right to say that

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they will not work with certain men, and the employer must accept their dictation or go without their services." The cited and kindred cases have undoubtedly gone to the extreme limit. But they have never held that citizens may be assaulted and industries or a business destroyed at will. Nor have they gone so far as to say that intimidation followed by felonious assaults is permissible, or that the assaults are justified if a man labors against the union's will. Other jurisdictions have had these questions before them. Picketing has been held unlawful in New Jersey. *George Jonas Glass Co.* v. *Glass Bottle Blowers Assn. of U. S. & Canada,* 72 N. J. Eq. 653; affd., 77 id. 219. In Michigan, no matter how peaceful or orderly it may be. *Beck* v. *Railway Teamsters Union,* 118 Mich. 497; *Clarage* v. *Luphringer,* 202 id. 612. In Illinois (*Barnes* v. *Chicago Typo. Union,* 232 Ill. 402); California (*Pierce* v. *Stablemens Union Local, etc.,* 156 Cal. 70); Ohio (*Otis Steel Co., Limited,* v. *Local Union No. 218 of Cleveland, Ohio,* 110 Fed. Repr. 698); Minnesota (*Knudsen* v. *Benn,* 123 id. 636). In Massachusetts it is not only unlawful, but has been declared to be a nuisance. *Vegelahn* v. *Guntner,* 167 Mass. 92. And in Iowa the same ruling was made. *Atchison, T. & S. F. Ry. Co.* v. *Gee,* 139 Fed. Repr. 582, 584. Among other things, the court in the case last cited said: "There is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching. When men want to converse or persuade, they do not organize a picket line. When they only want to see who are at work, they go and see, and then leave, and disturb no one physically or mentally. But such picketing as is displayed in the case at bar by the evidence does, and is intended to, annoy and intimidate. The argument seems to be that anything short of physical violence

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is lawful. One man can be intimidated only when knocked down. But the peaceful, law abiding man can be and is intimidated by gesticulations, by menaces, by being called harsh names, and by being followed, or compelled to pass by men known to be unfriendly. Perhaps such a man may not be a bully, but is frail in size and strength, or he may be a timid man; but such a man is just as much entitled to go and come in quiet, without even mental disturbance, as has the man afraid of no one and able with or without weapons to cope with all comers. The frail man, or the man who shuns disturbances, or the timid man, must be protected, and the company has the right to employ such."

At least a contrast is shown between what our courts have held on the subject of picketing and what the courts of sister states have declared. The cases cited may perhaps be explained or distinguished or even held inapplicable to the instant case, but whether followed or not, the fact remains that they also represent the best thought on a subject that touches the very heart of the body politic.

From the proof submitted, I find myself unable to agree with the argument of counsel for defendants, that the picketing in the case at bar has been as peaceful and as gentle as he would have me believe. The motion to continue the injunction *pendente lite* is granted. The amount of the undertaking to be given will be fixed on the settlement of the order.

Ordered accordingly.

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# THE BURGESS BROS. CO., INC., Plaintiff, *v.* FREDERICK STEWART, LOUIS JAFFA, WALTER ROSS et al., Defendants.

(Supreme Court, Kings Special Term, March, 1921.)

**Injunctions — when will be granted — labor unions — evidence — ships and shipping — conspiracy — United States Shipping Act (39 U. S. Stat. at Large, 728), §§ 14, 16 — United States Criminal Code, § 37.**

In an action by a large exporter of lumber at New York to restrain a course of conduct which, if persisted in, would inevitably bring financial ruin upon the plaintiff, some of the defendants, representatives of a labor union, openly stated that there was an avowed purpose on its part to force plaintiff to unionize its plant. This plan could not effectually be carried out without the cooperation of such of the defendants as were the owners or agents of steamship companies which under section 14 of the United States Shipping Act (39 U. S. Stat. at Large, 728), are required to serve the public without discrimination. While there was no proof of an agreement between the representatives of the steamship companies and the union to refuse plaintiff's product, there was sufficient evidence of their approval of, connivance at and sanctioning of the acts of the employees as to amount to an overt act on the part of the steamship companies. *Held,* that the various acts of the defendants alleged in the complaint amounted in law to a conspiracy. (P. 678.)

The concerted action of the representatives of the steamship companies, who evinced no desire to receive or handle plaintiff's lumber, and their employees, none of whom did they discharge or reprimand for discriminating against plaintiff, but openly sanctioned such conduct, leads to the accomplishment of an unlawful act; *i. e.,* that of violating both the United States Shipping Act and section 37 of the United States Criminal Code. (Pp. 678, 679.)

It being apparent that plaintiff will suffer irreparable damage, for which it has no proper or adequate remedy at law, an injunction broad enough to include agents, stevedores, receiving clerks, etc., will be granted against all of the defendants under section 16 of said Shipping Act. (P. 682.)



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ACTION for an injunction.

Austin, McLanahan & Merritt (Walter Gordon Merritt, of counsel), for plaintiff.

Kirlin, Woolsey, Campbell, Hickox & Keating (Charles R. Hickox and Albert H. Ely, Jr., of counsel), for defendants James F. Stuart, sued as "Frederick Stewart," Louis Jaffa, Walter Ross, James Meagher, Louis L. LeFurge, sued as "Lewis L. LeFurge," George J. Clark, Thomas A. Lilly, P. Kleppe & Company, Inc., doing business as North and South Atlantic Line, Ltd., Skeffington S. Norton, Joseph T. Lilly, John D. O'Reilly and John J. Farrell, copartners, doing business under the name of Norton, Lilly & Company, individually and as representatives of The American and Australian Steamship Line and American Mediterranean Levant Line, Robert P. Houston, doing business under the name of R. P. Houston & Company, Prince Line, Ltd., Furness, Withy & Company, Ltd., and United Port Service Co.

Mann Trice (James F. O'Neill, of counsel), for defendants John J. McLaughlin, Frank M. Henderson, individually and as president of Steamship Clerks' Union of Brooklyn and Staten Island, Local 975, I. L. A.; George Campbell, individually and as business agent of said Local 975; John Quinn, individually and as president of Truck Drivers and Chauffeurs Local Union 807 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers; William O'Neill and William Brown, both individually and as agents of said Local Union 807; Edward McCaffrey, individually and as president, and Joseph Ryan, individually and as secretary of the Transportation Trades Council of the Port of New York and vicinity.

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William W. Corlett, for defendants United States Steel Products Company, John W. Ryan and Frank C. North.

Lord, Day & Lord, for defendant Cunard Steamship Company, Ltd.

Baldwin & Curtis, for defendant Overseas Shipping Company.

CALLAGHAN, J. The plaintiff, a large exporter of lumber, has brought this action to restrain permanently the defendants from a course of conduct which it is claimed, if persisted in, must inevitably bring financial ruin upon the plaintiff.

The defendants here are steamship companies (operating steamships between the port of New York and various ports of the world) and some of their employees, agents, brokers and stevedores, and the officers and agents of the International Longshoremen's Union, Local 975, International Brotherhood of Teamsters, Local Union 807, The Greater New York Lumber Handlers' Union, 17122, and the Transportation Trades Council of the Port of New York.

There is little dispute about the facts. The plaintiff was an employer of non-union men. A demand was made upon it by the Teamsters' Union and the Lumber Handlers' Union to unionize its plant. This it refused to do, although it made no objection to its employees becoming members of the union. Being unable to induce the plaintiff to employ exclusively men who were members of the union, various of the defendants entered upon a plan to force a compliance with the demands of the union. The officers of the union, with commendable frankness, stated at the trial that it was their determination to "fight to a finish," and that this was a case of the "survival of the fit-

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test," which could only mean that it was the determination of the union to bring financial ruin upon plaintiff if it did not submit to the demands of the union.

The proof here shows that all the longshoremen in the port of New York, including checkers, weighers and handlers of freight, are members of the International Longshoremen's Association, and, although this association had made no demands upon the plaintiff, its members were directed to refuse to receive or handle any of plaintiff's lumber, unless plaintiff's trucks were driven by members of the Teamsters' Union. The result was that plaintiff was unable to ship any of its products. All the employees of the stevedores and of the steamship companies engaged in receiving and handling lumber were members of the Longshoremen's Union. Their action in refusing plaintiff's shipments was, in each instance, immediately called to the attention of the representatives of the owners of the steamships. There was no question of available space on the various steamships, as plaintiff had invariably procured from the representatives of the steamships reservations of space and directions to the receiving clerks to accept the plaintiff's lumber for shipment; and although some of the defendants attempted to show that shipments were refused because of lack of space, it is apparent that this was purely a subterfuge for the purpose of evading responsibility for what they conceived to be an illegal course of conduct.

The defendant the Transportation Trades Council is an advisory body, having no power to call strikes, but it acts in an advisory capacity and was charged with the duty of seeing that the various labor locals co-ordinated to force recalcitrant employers to meet the demands of the union. Delegates to this body

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come from the various locals in the port of New York. This organization passed a resolution which provided that none of the local unions should handle non-union goods or any goods transported by firms, corporations or individuals who refused to employ union men, or should contract to transport their goods at union terms.

The conditions prevailing in the port of New York at the time in question were and are a matter of common knowledge. There was a great shortage of labor, due to the then existing abnormal conditions. Steamship owners were at the mercy of the labor unions, and they felt, no doubt, that it was more profitable to tolerate, and, in fact, to openly countenance the unjust and illegal acts of the unions, than to discourage those of their employees who refused to handle plaintiff's lumber.

It would be strange, indeed, if the law is so impotent as to furnish no relief from a condition forced upon it, which, if continued, must inevitably bring financial ruin upon the plaintiff. Plaintiff has been guilty of no wrongdoing, but is engaged in a lawful pursuit. The plaintiff is not required to await the result of criminal proceedings, and allow its business to be ruined in the meantime, but may proceed by civil action to prevent the continuance of a wrong when the wrong is the result of a conspiracy in violation of the criminal law. *Rourke* v. *Elk Drug Co.*, 75 App. Div. 145; *Kellogg* v. *Sowerby*, 190 N. Y. 370. The conduct of those engaged in this unlawful discrimination has not and cannot be justified.

It is the purest sort of sophistry to argue that a decision here adverse to the labor unions is a violation of the Federal Constitution in that it imposes involuntary servitude upon the employees of various of the defendants. There is no suggestion that any of

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the employees are compelled to work for these defendants. Their right to work for whom they please, and when they please, is inalienable, and any judgment of the court to the contrary could not stand; but it would be absurd to permit the employees to continue on a course of conduct which makes the steamship owners guilty of a violation of the statute in discriminating unlawfully against the shippers of goods. If such a course of conduct is countenanced it must, if carried to a logical conclusion, result in destroying all who do not employ union men, coercion greater, in fact, than that of which some of the defendants are now complaining.

The various acts of the defendants amount, in law, to a conspiracy against the plaintiff. The approved definition of a conspiracy is found in *Pettibone* v. *United States,* 148 U. S. 197, and approved in *Duplex Printing Press Co.* v. *Deering,* U. S. Supreme Court, Advance Opinions, February 1, 1921, p. 176. It is: "A combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose or some purpose not in itself criminal or unlawful, by criminal or unlawful means."

Those defendants who were owners or agents of steamships were required to serve the public without discrimination, and if their employees continued voluntarily in their service the same obligation rested also upon the employees. This record is barren of any evidence which would indicate a desire on the part of the steamships' representatives to receive or handle plaintiff's lumber. They did not discharge or reprimand any of their employees for discriminating against plaintiff but openly sanctioned such conduct and connived at it, on the theory no doubt that it was better that plaintiff should suffer than that the movement of freight in the port be "tied up." The con-

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certed action both of the employer and the employees leads to the accomplishment of an unlawful act, *i. e.*, that of violating both the United States Shipping Act (39 U. S. Stat. at Large, 728) and the United States Criminal Code, section 37. The Shipping Act, in so far as it is applicable to the situation, is as follows:

"Sec. 14. That no common carrier by water shall * * * unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims. Any carrier who violates any provision of this section shall be guilty of a misdemeanor, punishable by a fine of not more than $25,000 for each offence.

"Sec. 16. That it shall be unlawful for any common carrier by water, or other persons subject to this Act, either alone or in conjunction with any other person, directly or indirectly —

"*First.* * * * to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"*Second.* * * *

"Sec. 17. * * * Every such carrier and every other person subject to this Act shall establish, observe, and enforce just and reasonable regulations and practices relating to and connected with the receiving, handling, storing, or delivering of property."

This statute is declaratory of the common law, which placed an obligation upon the common carrier to serve the public without discrimination. A carrier cannot avoid this responsibility. It is no answer to a charge of misconduct amounting to a discrimination to say that the unlawful act is that of an employee. It was

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the duty of the employers to find those who would handle all goods offered for shipment, and if those employed to do that work refused there could be no other alternative but to discharge such employee even though it may have led to a great financial loss to the steamship owners and inconvenience to the public. The employee is the *alter ego* of the principal and any act of the employee in violation of the common law, or of the statute, is the act of the principal, for which the principal is liable.

We have, therefore, a situation where the representatives of the union openly state that there was an avowed purpose on the part of the union to force plaintiff to submit to its demands or suffer the penalty of financial ruin. The price demanded by the union was that all of plaintiff's employees be members of the union. This plan could not be effectually carried out without the co-operation of the steamships' representatives. A defiance by them of the union would have frustrated the plan, and while it has not been shown here that there was an agreement between the representatives of the steamship companies and the union to refuse plaintiff's products, there is sufficient evidence of their approval of, the connivance at, and the sanctioning of, the acts of the employees as to amount to an overt act on the part of the steamship companies. For these reasons they may be properly regarded as a party to the unlawful combination.

The views herein expressed do not conflict with the decisions in the *Reardon* cases (*Reardon, Inc.*, v. *Caton*, 189 App. Div. 501; *Reardon* v. *International Mercantile Marine Co.*, Id. 515). In the first of these cases neither the employers, common carriers nor shippers of freight were made parties; and in the second of these cases there was no suggestion that a conspiracy between the common carriers or the employees was

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pleaded, and the labor unions were not parties defendant.

I do not regard what has been said in the *Reardon* cases as controlling here. The most that can be claimed for them is that, upon the facts presented, the court held that the injunction granted at Special Term was improper. But a careful analysis of all the opinions written in those cases will show that the majority of the court agrees with the contentions herein made. In *Reardon, Inc.*, v. *Caton, supra,* no common carrier was joined as party defendant. The question of an unlawful discrimination was not, therefore, before the court. Presiding Justice Jenks and Justice Rich concurred in the prevailing opinion, while Justices Putnam and Mills dissented. In *Reardon* v. *International Mercantile Marine, supra,* however, Mr. Justice Rich was of the opinion that the carrier should have received the freight when offered, and, therefore, concurred in the dissenting opinion of Mr. Justice Mills, while Mr. Justice Putnam concurred in the reversal solely because there had been a reversal in *Reardon, Inc.*, v. *Caton,* and, inasmuch as the actions were closely related, he held that consistency required a reversal in the latter case. The reasoning of the majority of the court leads to the conclusion that had the unions and common carriers been joined as parties defendant, as in this case, the court would, upon the facts shown in the two cases, have sustained the injunction granted at Special Term.

Some of the defendants here in their briefs admit that the facts in this case are "almost exactly similar" to the facts in *Buyer* v. *Guillan.* I concede the similarity in facts. The lower court in that case refused an injunction, but since the preparation of the briefs before me, the Circuit Court of Appeals has unanimously reversed the decision of the lower court and directed that an injunction issue.

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It is apparent that plaintiff will suffer irreparable damage for which it has no proper or adequate remedy at law, unless an injunction issue, and as the Shipping Act (§ 16) is broad enough to include agents, stevedores, receiving clerks, etc., the injunction will run against all the defendants.

Ordered accordingly.

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LOUIS KUSSOLD and FRANK PETSCHE, Plaintiffs, *v.* JACOB BEHRMAN and ALBANESE SALVATORE, Defendants.

(Supreme Court, Kings Special Term, March, 1921.)

**Judgments — proceedings for sale of infants' real estate — title — specific performance — Code Civ. Pro., §§ 1646, 1679.**

The complaint in an action brought against infants under section 1638 *et seq.* of the Code of Civil Procedure to compel a determination of their adverse claims to plaintiffs' title to certain real property set forth a proceeding for the sale of defendants' interest in the property, alleged that a sale thereof by their mother, as special guardian, was in good faith and for full consideration, and that a reconveyance of the property to her individually, who conveyed to plaintiffs, was made in good faith "and for the interest and welfare of the defendants." Judgment was entered in favor of plaintiffs forever barring the defendants from all claims to any estate, right, title or interest in and to the property. The vendee named in a contract for the sale of the property objected to the title as unmarketable on the ground that a finding of the court that the sale of the property to the mother was made "in good faith and for the interest and welfare of defendants" impressed some kind of a trust upon the property for the benefit of the infants. *Held*, that the answer to such contention was, that reading the quoted words in connection with the findings and judgment as a whole, which negatived any declaration of trust in favor of the infants, they meant simply that the infants' proceeding in its entirety, including the sale and disposition of the infants' interest in the property, was for their interest and welfare.

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The findings of the court in the other action, that the special guardian "duly" sold the defendants' interest and that such sale, which was directly approved in the infants' proceeding, was made "in good faith and for a valuable and full consideration" was binding on the court in the present action and was an answer to a contention that any deed to the mother, as purchaser, was void under section 1679 of the Code of Civil Procedure, and that her deed to plaintiffs conveyed nothing.

Section 1646 of the Code of Civil Procedure does not confer upon infants an absolute right to a new trial, and a contention that such a right was sufficient of itself to render the title unmarketable, is untenable, and in a vendor's action to compel specific performance of a contract for the sale of the property the plaintiffs are entitled to judgment.

ACTION by vendors to compel specific performance of a contract for the sale of real estate.

Stephen F. Burkard, for plaintiffs.

Nathan D. Shapiro, for defendants.

KAPPER, J. Plaintiffs sue to compel specific performance by the defendants, their vendees named in a contract for the sale of real property. Objections to the marketability of the title were presented upon the trial by the defendants. The following facts appear: One Max Singer died intestate in 1910 seized of an undivided one-half interest in the property. He left as his only heirs-at-law seven infant children. In 1911 a proceeding was instituted in this court for the sale of the said interest of said infants, and their mother, Mollie Singer, was appointed their special guardian. Thereafter and pursuant to an order made in said proceeding the said special guardian sold and conveyed the infants' interests in said property to Julius Pearson and Morris Gerstenfeld by deed dated February 24, 1912. Two days later the said grantees reconveyed said property to said Mollie Singer,

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individually, and she in turn conveyed to the plaintiffs herein by deed dated January 25, 1913. In January, 1920, the plaintiffs herein brought an action in this court (which will hereinafter be referred to as *Kussold* v. *Singer*) against the said infant heirs of said Max Singer, deceased, under the provisions of article 5 (§§ 1638 *et seq.*) of the Code of Civil Procedure, to compel a determination of their adverse claims to plaintiffs' title. The complaint sets forth the said proceeding for the sale of the interests of said infants in said property and alleged that the sale by the special guardian, Mollie Singer, to said Pearson and Gerstenfeld was in good faith and for full consideration, and that the sale by them to said Mollie Singer was made in good faith "and for the interest and welfare of the defendants." Jurisdiction of said infants was duly obtained and a guardian *ad litem* appointed who thereafter qualified and interposed the usual guardian's answer. The action was tried at a Special Term of this court in May, 1920, the guardian *ad litem* appearing and representing said infants on the trial. Thereafter, and on May 28, 1920, the court made and filed its findings and decision whereby judgment was awarded to the plaintiffs forever barring the defendants from all claim to any estate, right, title or interest in and to the said property and judgment was entered accordingly. The fifth and sixth findings were as follows: "V. That the sale of said real property so made by Mollie Singer as such special guardian to said Julius Pearson and Morris Gerstenfeld was made in good faith and for a valuable and full consideration, and the sale of said real property by said Julius Pearson and Morris Gerstenfeld to Mollie Singer was made in good faith and for the interest and welfare of the defendants. VI. That the sale of said real property by Mollie Singer to the plain-

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tiffs in this action was made in good faith and for a full and adequate consideration, and the purchase price of said real property paid by the plaintiffs to said Mollie Singer was used by her for the support, maintenance and education of the defendants during their minority." Notwithstanding such judgment in the action of *Kussold* v. *Singer* the defendants at bar assert that the title is unmarketable. Their first objection seems to be that the words in the fifth finding "*in good faith and for the interest and welfare of the defendants*" impress some kind of a trust upon the property for the benefit of the infants. While the argument of defendants' counsel in this connection seems rather involved, I think the answer to any such contention is that the quoted words must be read in connection with the findings and the judgment as a whole, and when so read the words mean simply that the said infants' proceeding in its entirety, including the sale and disposition of the infants' interest in the property, was for their interest and welfare. Moreover, the form of the judgment negatives the contention that the court intended, by its findings and decision, to declare a trust in favor of the said infants. The defendants next claim that the testimony in the action of *Kussold* v. *Singer* discloses that Pearson and Gerstenfeld paid no consideration whatever for the said transfer to them by the special guardian; that this fact, together with the fact that they reconveyed the property to her individually two days later, stamps the transaction as colorable and strongly indicates that the special guardian herself was the real purchaser; and, therefore, that any deed to herself as purchaser was void under section 1679 of the Code, with the result that her deed to the plaintiffs in this action conveyed nothing. The answer to this contention is found in the court's findings to the effect that

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the special guardian "duly" sold the infants' interest to said Pearson and Gerstenfeld and that such sale was made "*in good faith and for a valuable and full consideration.*" I am bound by this finding. Moreover, the said sale to Pearson and Gerstenfeld was directly approved by the court in the infants' proceeding. The principal contention, however, is that the infant defendants in the action of *Kussold* v. *Singer* have an absolute right under section 1646 of the Code to a new trial and that this right is of itself sufficient to render the title unmarketable. Section 1646 is as follows: "A final judgment in favor of either party, in an action brought as prescribed in this article, is conclusive against the other party, as to the title established in the action; and also against every person claiming from, through, or under that party, by title accruing after the filing of the judgment-roll, or of the notice of the pendency of the action, as prescribed in article ninth of this title. A new trial of said action after judgment shall not be granted as a matter of right, but the court may, in its discretion in the interest of justice, grant a new trial upon an application made by any party within one year after said judgment. But where a defendant is an infant, an idiot, a lunatic, an habitual drunkard, or imprisoned on a criminal charge or in execution upon conviction of a criminal offense for a term less than life, the said defendant shall have the right, within one year after his disability is terminated, to apply for and obtain a new trial of said action, and the representatives of such a defendant shall have the same right within one year after the death of said defendant, if such death occurs while the disability continues. Upon any new trial of an action, brought as prescribed in this article, the record of the evidence given upon the previous trial, may be again

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offered to the court by either party, and may be received in evidence, in case the same evidence cannot be again procured. The courts may make such rules and orders as to preserving the record of the evidence given in such actions and perpetuating the proofs produced therein, either with or without the awarding of any other relief to the party whose proofs are so perpetuated, as shall be necessary or proper, and may embrace such directions in the judgment." Section 1646 of the Code does not seem to me to confer upon infants an absolute right to a new trial. In the case of infants the section simply dispenses with the necessity of making the application within one year after the judgment and permits the application to be made within one year after the disability is terminated when the application may or may not be granted as the interests of justice may require. However this may be, I think the rule formerly adopted in ejectment cases is here applicable. Prior to its repeal (Laws of 1911, chap. 509) section 1525 of the Code mandatorily required the court, upon application made within a stated period, to vacate the judgment and award a new trial in ejectment. Nevertheless, title has been held marketable and specific performance has been decreed despite the possibility of a second trial under this section. *Haffey* v. *Lynch*, 143 N. Y. 241. In the case cited it was said (p. 248): "Here the plaintiff was willing to take such a title as the defendant could convey at the trial. The ejectment suit had finally resulted in favor of the defendant. The *lis pendens* had ceased to be operative, and could, if necessary, have been removed. The fact that Jarvis could have paid the costs and taken a new trial under the statute is of no importance. There was final judgment against him, and the contingency that he might take a new trial is

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of no more importance than the contingency that some other person might at some time commence an action to recover the same land. Equity courts, in awarding relief, generally look at the conditions existing at the close of the trial of the action and adapt their relief to those conditions." See, also, *Rosenberg* v. *Haggerty*, 189 N. Y. 485. In the *Haffey Case, supra*, the first action in ejectment had resulted in a judgment of dismissal. In the present, as already stated, the infants were barred by a judgment against them from all claim to the property in question. The situations are not dissimilar. The rule announced in the *Haffey* case, notwithstanding the *mandatory* character of section 1525, seems to me to be determinative in this case where section 1646, as I read it, is *permissive* only. Defendants also suggest that the bond required of the special guardian in the infants' proceeding was insufficient in amount under rule 57. The contention, I presume, is based upon the fact that the interest of the infants was sold for $500 while the bond was for the sum of $1,000 only. Even if it be assumed that the point can be raised in this action, there is no proof before me that the bond was not sufficient in the light of the information in the possession of the court when the amount was fixed. No authority is presented to the effect that exact mathematical accuracy in the fixation of the amount of the bond is a prerequisite to jurisdiction.

Judgment for plaintiffs, with costs.

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POSTAL TELEGRAPH CABLE COMPANY, P.
OF JAMESTOWN, Defendar

(Supreme Court, Chautauqua Special Term

**New trial — newly discovered evidence — when trial denied — evidence — judgments.**

New trials are granted because of newly for the purpose of giving to a party the be which he was unaware at the time of the ple for the purpose of permitting a defendant out a controversy.

The essential characteristic of newly dis that it was unknown at the time of pleadin come to light since.

Where the judgment in favor of plaintiff i a municipality has been unanimously affirr late Division and leave to appeal has been Appellate Division and the Court of Ap should not be put to the trouble and expe simply because the defendant was unable t a part of its public records, of which it kr its answer and had within its control, and a trial upon the ground of newly discovere denied, with costs.

MOTION for new trial on the groun covered evidence.

Ernest Cawcroft, for motion.

James O. Moore, opposed.

WOODWARD, J. This action was c menced in April, 1915. It was discontii action commenced on the 6th day of S The action came on for trial in Decemb ing in a judgment in favor of the pl

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upon the findings of fact and conclusions of law made by the court. The defendant appealed to the Appellate Division of the Supreme Court, where the judgment was unanimously affirmed. An application was made to the Appellate Division for permission to appeal to the Court of Appeals and denied, and a like result followed an application made to the Court of Appeals.

With a judgment thus finally approved by all the courts having jurisdiction within the state of New York, the defendant in November, 1920, moved this court for a new trial on the ground of newly-discovered evidence, and the question here under consideration is whether or not that motion should be granted.

The proceedings of the common council on June 24, 1894, which is the alleged newly-discovered evidence, contain the following paragraph, upon which the defendant relies to overturn the result deliberately reached in this action: "It is understood that some of the poles which are to be set by said applicants are to take the places of poles now used by the City, and that such poles are to be carefully taken down and taken away by the said companies to such part of the City as its officers shall direct, and the wires shall be carefully strung and set upon the poles and on each and all the poles set under this permit and the City shall have the right to attach any municipal wire used by it for any purpose, and that the City shall have the right to use for such purpose the upper two feet of each and every said pole."

Just how this could aid us in determining that the plaintiff agreed that the defendant should have such use without compensation, does not clearly appear. This question was fully considered upon the trial; the determination made upon the whole evidence, and if this alleged new evidence had appeared in the case

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it is not at all certain that it would have changed the result. Of course it might have opened the way to further evidence, but that is not suggested in the moving papers, and it seems very doubtful, as we recall the evidence, whether the matter now brought forward would have had any appreciable effect upon the issues determined.

But is this newly-discovered evidence entitling the defendant to the privilege of a new trial? The defendant's answer alleges that "long prior to the commencement of this action, an agreement was entered into by and between the parties to this action by which each agreed to afford the other reciprocal use of poles, and being the poles or a portion of the poles referred to in the complaint, and the agreement, if not signed by this plaintiff, was signed by a corporation to whose rights in the poles referred to in the complaint, or some of them, this plaintiff succeeded." This evidently referred to the matter now urged as newly-discovered evidence, but the essential characteristic of newly-discovered evidence is evidence which was unknown at the time of the pleading or trial, and which has come to light since that time. A thing cannot be newly discovered which is already fully known. The defendant knew about this evidence at the time it put in its answer; it was a part of the public records of the city of Jamestown—a part of the proceedings of its common council which the law requires to be published and preserved—and the fact that it was not found upon a more or less careful search does not give it the character of newly-discovered evidence. New trials are granted because of newly-discovered evidence for the purpose of giving to a party the benefit of evidence of which he was unaware at the time of the pleadings or trial, not for the purpose of permitting a defendant to needlessly drag out a con-

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troversy, and the fact that this evidence was found long after the determination of the case, both upon the trial and the appeals, is not calculated to move the court to grant the motion for a new trial. The evidence was not only known to the defendant at the time of entering its pleadings, but it was actually in the defendant's custody and control and a reasonably diligent search must have discovered it to the person making such search. It was the duty of the city clerk to have had such a record where it was available. The law presumes that duty to have been discharged, and the plaintiff having succeeded in establishing its cause of action, and maintaining it through the appeals, should not be put to the trouble and expense of a new trial simply because the defendant was unable to produce the evidence which it concededly knew about and had within its control.

In *Fisher* v. *Corwin,* 35 Hun, 253, Mr. Justice Barker declared that the " practice has been, before and since the adoption of the first Code, not to entertain motions of this character after appeal from final judgment. The current of the decisions are not to entertain the motion after the entry of judgment, and it was so held in *Jackson* v. *Chase* (15 Johns. 354); *Rapelye* v. *Prince* (4 Hill, 125); *Sheldon* v. *Stryker* (27 How. Pr. 387); *Peck* v. *Hiller* (30 Barb. 656); *Nash* v. *Wetmore* (33 id. 155); *Lawrence* v. *Ely* (38 N. Y. 42)." See, also, *Davis* v. *Grand Rapids Fire Ins. Co.,* 7 App. Div. 403, 405, and authorities there cited.

The motion should be denied, with costs.

Motion denied, with costs.

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## Matter of Proving the Last Will and Testament of ARTHUR HENRY GAFFKEN, Late of the County of Kings, Deceased.

(Surrogate's Court, Kings County, March, 1921.)

**Wills — when may be admitted to probate — testamentary provisions — Decedent Estate Law, § 35.**

A testamentary provision in the will of an unmarried testator for one who was his wife at the time of his death is a provision for his "wife" within the meaning of section 35 of the Decedent Estate Law, as amended in 1919, and the will may be admitted to probate subject to the rights of testator's son, not mentioned in the will, as provided in such statute.

PROCEEDING upon the probate of a will.

Harry W. Kouwenhoven, for proponent.

Herbert Parsons, for contestant.

WINGATE, S. The determination as to whether the will propounded for probate is revoked by marriage and birth of issue after its making is controlled by the law in force at the date of the testator's death.

The intention of the legislature, by the amendment in 1919 to section 35 of the Decedent Estate Law, seems to have been to provide that a will is revoked under the conditions specified in that section only as to such of the class of wife and issue as are not provided for in the will or by some settlement, or in such way mentioned in the will as to show an intention not to make such provision. The provision in the propounded paper for Marie Louise Krom, who was the testator's wife at the time of his death, is a provision for his wife within the meaning of this

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statute, and as to her the will of the decedent is not revoked.

There is concededly no provision for decedent's son contained in the will now before the court or in any settlement, nor is any mention made of him in the will. He is, accordingly, entitled to the same rights in the estate of the decedent as would be his if such will had not been made.

The will is admitted to probate subject to the rights of the testator's son as provided in the statute cited *supra*.

Probate decreed.

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## Matter of the Estate of GUSTAV H. KUNTZSCH, Deceased.

(Surrogate's Court, New York County, March, 1921.)

**Executors and administrators — alien enemies — Trading with the Enemy Act, § 7.**

A proceeding under section 7 of the Trading with the Enemy Act, on behalf of an alleged widow who is a resident citizen of Germany, to revoke letters of administration granted upon the estate of her alleged husband, cannot be further prosecuted until peace is formally declared.

APPLICATION to revoke letters of administration.

Arnold & Greene, for petitioner.

David C. Lewis, for Hulda W. Kuntzsch.

FOLEY, S. This proceeding, begun by the filing of a petition and the issuance of a citation, must be deemed to be a special proceeding within subdivision b of section 7 of the Trading with the Enemy Act. It is

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an application to revoke letters of administration. The petition is by the Swiss consul in charge of German interests on behalf of an alleged widow who is a German citizen and resident of Germany. "The law is well settled that an alien enemy, resident in the enemy's country, cannot during the war prosecute an action in our courts." *Jackson* v. *Decker,* 11 Johns. 418; *Bell* v. *Chapman,* 10 id. 183; *Sanderson* v. *Morgan,* 39 N. Y. 231; *Kershaw* v. *Kelsey,* 100 Mass. 561; *Rothbarth* v. *Herzfeld,* 179 App. Div. 865; affd., 223 N. Y. 578; *Farenholtz* v. *Meinshausen,* 181 App. Div. 474; *Hungarian General Credit Bank* v. *Titus,* 182 id. 826. The proceeding, therefore, cannot be further prosecuted until peace is formally declared. The other objections to the petition will be considered when the proceeding can be properly submitted to the attention of the court. Settle order on notice suspending further proceedings herein as indicated. The order should also restrain the administratrix from making any distribution of the estate pending the disposition of this proceeding.

Decreed accordingly.

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PLYMOUTH RUBBER COMPANY, Plaintiff, *v.* DAVID H. KNOTT, etc., AMERICAN SURETY COMPANY, etc., Defendants.

(Municipal Court of the City of New York, Borough of Manhattan, Ninth District, March, 1921.)

**Contracts — when consignment of merchandise upon conditions not conditional sale — title in consignor — attachment — conversion — damages — Personal Property Law, § 62.**

An agreement for the consignment of merchandise upon conditions therein stated is not such a contract for the conditional sale of goods and chattels as is required, by section 62 of the Personal Property Law, to be filed.

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Under such an agreement the title to the goods remains in the consignor and they are not subject to attachment by a creditor of the consignee.

Where a sheriff's jury finds that certain goods, when attached in an action against the consignee, were the property of the consignor, the plaintiff, in an action against the sheriff or his surety on a bond for a return of the goods, for a wrongful conversion, is entitled to recover as damages the highest value of the goods between the time of the conversion and the trial of the action.

ACTION for damages.

Charles B. Alling, for plaintiff.

Bennett E. Siegelstein, for defendant.

GENUNG, J. This is an action for damages for wrongfully seizing and taking into his possession certain rubber goods, claimed to be the property of the plaintiff, and for the value of the said rubber goods, brought against the sheriff of the county of New York, for whom the American Surety Company of New York has been substituted as defendant.

The rubber goods in question were shipped by the plaintiff to one Smith, who had a place of business at 132 West Broadway, New York, under invoices, marked "consigned to" Smith. These consignments were all made pursuant to an agreement between the plaintiff and Smith, dated September 10, 1919. This agreement was made between the plaintiff, designated as "consignor," and Smith, designated as "consignee," and provided: "The consignor upon acceptance of orders placed with it by the consignee agrees to furnish the consignee its goods upon the following terms and conditions:

"(1) The title to all goods so furnished to the consignee shall remain in the consignor until a sale

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thereof shall have been effected by the consignee, and until such sale, the consignee agrees to keep the said goods of the consignor insured * * * for the benefit of the consignor * * *.

" (2) No credit shall be given by the consignee to any of his customers for a greater length of time than ninety (90) days without the written consent of the consignor * * *.

" (3) The consignee shall keep a separate set of books in which he shall enter all goods received from the consignor * * *.

" (4) Upon the sale by the consignee of any of the goods consigned hereunder, the consignee shall forthwith forward to the consignor the funds received by him therefor, after first deducting, however, for his own use and benefit the difference between the price at which the goods were consigned to him by the consignor and his sale price to the customer.

" (5) In the event of a sale by the consignee of the goods of the consignor where shipment is requested and made direct to a customer of the consignee and the goods billed to the consignee by the consignor, such goods so shipped and billed shall be subject to and under all the terms and conditions of this agreement.

" (6) All goods shipped by the consignor to the consignee prior to the date of execution of this agreement and now in the possession of the consignee now unsold shall be subject to and under all the terms and conditions of this agreement.

" (7) In the event of a sale by the consignee of the goods of the consignor where shipment is requested and made direct to the customer of the consignee and the goods billed to the customer, the said consignee hereby guarantees the payment of such accounts * * *."

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After the making of this agreement, in December, 1919, an action was commenced in the Supreme Court, New York county, against the said Smith by Goldberg & Freud, for goods sold and delivered in the sum of $2,477.05, and an attachment was issued to the sheriff of the county of New York against the property of the said Smith. The sheriff attached certain rubber goods in the place of business of the said Smith, at 132 West Broadway. A claim was made " in behalf of " the plaintiff for the rubber goods. The said Smith did not appear in the action, and, after service had been perfected against him, a judgment was entered by default in the sum of $2,691.42. Thereafter, on July 26, 1920, the sheriff sold the said rubber goods for $410, said Goldberg & Freud having filed a bond issued by the American Surety Company of New York. The plaintiff made claim to the said rubber goods and a sheriff's jury found that such rubber goods belonged to the plaintiff at the time of said attachment by the sheriff of the county of New York. Thereafter an additional bond was issued by the American Surety Company of New York and a demand was made on the sheriff of the county of New York for the return of said rubber goods, and upon his failure to comply therewith the plaintiff brought this action in conversion.

The defendant claims that the plaintiff has failed to prove by a preponderance of the evidence that the rubber goods attached by the sheriff were its property. The plaintiff has stipulated that the agreement of September 10, 1919, has not been filed in either the office of the county clerk or the register of the county of New York, nor has a conditional bill of sale or chattel mortgage been filed. The defendant claims that the agreement of September 10, 1919, is required to be filed by the statute (Pers. Prop. Law [Consol.

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Laws, chap. 40], § 62), and the alleged agreement not having been filed either as a conditional bill of sale or as a chattel mortgage is of no force and effect, in so far as third parties are concerned.

Section 62 of the Personal Property Law provides: "Except as otherwise provided in this article, all conditions and reservations in a contract for the conditional sale of goods and chattels, accompanied by delivery of the thing contracted to be sold, to the effect that the ownership of such goods and chattels is to remain in the conditional vendor or in a person other than the conditional vendee, until they are paid for, or until the occurrence of a future event or contingency shall be void as against subsequent purchasers, pledgees or mortgagees, in good faith, and as to them the sale shall be deemed absolute, unless such contract of sale, containing such conditions and reservations, or a true copy thereof, be filed as directed in this article, and unless the other provisions of the lien law applicable to such contracts are duly complied with. * * *"

The agreement of September 10, 1919, is not such a contract for the conditional sale of goods and chattels as is required by the foregoing provision of the statute to be filed. There is no provision of law requiring that such a contract be filed. The Factor's Act (Pers. Prop. Law, § 43) is not applicable nor is any other section of the Personal Property Law. It is an agreement for consignment of merchandise by the plaintiff to Smith under the conditions therein stated. Such consignments and the rights of the parties thereto have been defined by the courts. *Rolker* v. *Great Western Insurance Company*, 4 Abb. Ct. App. Dec. 73; *Seymour* v. *Wyckoff*, 10 N. Y. 213; *Baker* v. *Nat. Exchange Bank*, 100 id. 31; *Commercial National Bank* v. *Heilbronner*, 108 id. 439; *Britton* v. *Ferrin*, 171

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id. 235. It has been held that in certain cases goods shipped on consignment cannot be seized under an attachment. *Moore* v. *Hillabrand,* 16 Abb. N. C. 477; *Hampton & B. R. & Lumber Co.* v. *Sizer,* 31 Misc. Rep. 499; *Marine* v. *Jauncey,* 1 Barb. 486; *Francklyn* v. *Sprague,* 10 Hun, 589; *Converseville Co.* v. *Chambersburg Woolen Co.,* 14 id. 509. As the agreement of September 10, 1919, was not required by statute to be filed, the title to the rubber goods remained in the plaintiff, and the said rubber goods were not subject to attachment by a creditor of the consignee.

The regular rule of damages in an action for conversion is applicable to this case, that for a wrongful conversion of property where there is a rise in the value of the chattel after the conversion, the plaintiff may recover the highest intermediate value between the time of the conversion and the time of the trial. *Romaine* v. *Van Allen,* 26 N. Y. 309; *Burt* v. *Dutcher,* 34 id. 493; *Scott* v. *Rogers,* 31 id. 676; *Groat* v. *Gile,* 51 id. 442. The value of the rubber goods at the time of the attachment was as follows: 1,353 pairs of black toesans at forty-eight cents, and 238 pairs of tan toesans at seventy-one cents, a total of $818.42. Prior to the institution of this action the price advanced, making the value as follows: 1,353 pairs of black toesans at fifty-five cents, and 238 pairs of tan toesans at eighty-five cents, a total of $946.45. This testimony as to value was not contradicted. The plaintiff, therefore, is entitled to recover judgment against the defendant for the amount of $946.45, with interest from December 20, 1919, amounting to $59.92, making a total of $1,006.37, with ten days stay of execution.

**Judgment accordingly.**

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# MEMORANDA

## *Opinions not Otherwise Reported.*

ANNA LESSER, Plaintiff, *v.* LOUIS N. LESSER, Defendant.*

(Supreme Court, Kings Special Term, December, 1918.)

*Husband and wife — action for separation — dismissal of complaint on merits — judgment may not be amended so as to provide for education and maintenance of children — Code Civ. Pro. § 1771 — remedy is under Domestic Relations Law, § 70.*

MOTION to amend judgment.

Aaron W. Levy, for plaintiff.

Robert H. Elder, for defendant.

LAZANSKY, J. After the trial of this action resulting in the dismissal of the wife's complaint by which she sought a judgment of separation, I declined to provide for the custody and maintenance of the children. *Robinson* v. *Robinson*, 146 App. Div. 533. Judgment dismissing the complaint on the merits having been entered, a motion is now made to amend the judgment by inserting a provision requiring the defendant to provide for the education and maintenance of the children. The learned Appellate Division in the case cited followed the rule laid down in *Davis* v. *Davis*, 75 N. Y. 221, that the provisions of section 1766 of the Code of Civil Procedure do not empower the court to award incidental relief to a plaintiff where her claim to principal relief failed because "where the principal relief sought by the plaintiff is denied no power exists to give judgment awarding the custody

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of the children of the marriage to the plaintiff and to make provision for their maintenance out of her husband's property." The court held that section 1766 only applies where a judgment of separation is granted. On this basis there could be no power after judgment to insert provisions for custody and maintenance of the children unless there be statutory warrant therefor. It is insisted that section 1771 gives that power. The only authority cited in support of the proposition is *Light* v. *Light*, 124 App. Div. 567. In that case the wife's complaint in an action for cruel and inhuman treatment was dismissed and the custody of the children was awarded to the husband. In that case the court said: "but in the wife's action the court had to award the custody of the child (Code Civ. Pro. § 1771), and properly awarded it to the husband (citing cases)." The court then said: "Section 1766 only relates to a case where a judgment of separation is given, while section 1771 relates to the final judgment in a separation case, whatever it may be." The last sentence is seized upon by the plaintiff who claims that this being a separation suit, "whatever it may be," and although she was unsuccessful and no provision was made for the custody of the children, the court has power under the provisions of section 1771 to amend the judgment by inserting such directions concerning the children as justice requires. It seems to me that within its very broad statement, that section 1771 relates to a separation case, whatever it may be, the court meant to include only those cases where, regardless of the result of the litigation as to the principal relief, an award of the custody of the children is made to the successful party.

Of course, all that was necessary to be decided in the case was, that where the wife's complaint is dismissed, the court may under section 1771 award the custody of the children to the husband. If for no

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other reason than a practical one, I would, indeed, be glad to accede to a strong inclination to construe the language in *Light* v. *Light, supra,* to its fullest extent and grant the motion made herein. But legislative mandate, even if not practical and though dubiously conveyed, but plainly construed by the courts, is superior to and overrides that inclination. In matrimonial actions the courts' inherent authority over the custody and control of children has no place. *Davis* v. *Davis, supra.* Section 1771 of the Code of Civil Procedure is derived from 2 Revised Statutes, section 59, which provides: "In any divorce suit brought by a married woman for a divorce, or for a separation from her husband, the court in which the same shall be pending, may, during the pendency of the cause, or at its final hearing, or afterwards, as occasion may require, make such order as between the parties, for the custody, care and education of the children of the marriage, as may seem necessary and proper, and may at any time thereafter, annul, vary or modify such order."

The Court of Appeals has held in *Davis* v. *Davis, supra,* that this section only applies when a decree shall be granted. It seems to me that, as far as the question in hand is concerned, section 59 of the Revised Statutes is practically the same as section 1771 of the Code of Civil Procedure. *Salomon* v. *Salomon,* 101 App. Div. 588; *White* v. *White,* 154 id. 250.

I am, therefore, of the opinion that section 1771 of the Code of Civil Procedure does not give the court the power to grant this motion. If my conclusion is correct, there should be legislation which would empower the court in every matrimonial action, regardless of the disposition of the principal question, to make provision for the custody, education and support of the children of the marriage. If the parties are honestly before the court to have their domestic difficulties adjudicated it would be for the best interests of all and avoid other proceedings to

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have the whole matter as it affected them and their children adjudicated.

It would not be necessary, as it will be here, for a plaintiff to have recourse to the proceedings provided for by section 70 of the Domestic Relations Law.

Motion denied.

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HARRY WASSERMAN, Plaintiff, *v.* IRVING NATIONAL BANK, NEW YORK, Defendant.*

(Municipal Court of the City of New York, Borough of Manhattan, Second District, May, 1920.)

*Action — to recover money paid to secure remittance in Poland — damages for non-delivery to designated payee — judgment for plaintiff.*

ACTION to recover money paid for transmission by cable.

Buchler & Richman (Louis Richman, of counsel), for plaintiff.

Daniel E. Hanlon (Merton E. Lewis and Robert C. Morris, of counsel), for defendant.

BLAU, J. This action is brought to recover the sum of $120 paid by the plaintiff to the defendant for cable transmission to Poland in currency of that country, together with a small further sum representing charges similarly paid to defendant by plaintiff as part of the instant transaction.

The defendant, a national bank, had advertised in a foreign language paper that it sent money to Poland by post or cable "at the lowest prices;" and the advertisement carried the wording "perfect security and speed guaranteed."

Seeing this published announcement and in reliance thereon, the plaintiff went to the defendant institution.

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and arranged to send the equivalent, in Polish exchange, of $120 to a designated payee in Poland. In addition to the regular cable charges for the transmission of this remittance, an additional charge of $5 was made to cover the cost of a reply cable.

Despite a conflict in the testimony it appears fairly established that the plaintiff was led to understand and believe by the teller at the bank with whom the dealing was had, that this additional item in line with the advertised announcement was the means for insuring and securing the speedy and secure delivery of his remittance abroad; and he was told that in case of the non-production of a receipt within a period of three weeks, showing the delivery of the money, the whole amount paid by him would be refunded.

The entire transaction as thus explained by plaintiff fits in with his story of this express representation. For if there was no discussion of a guaranty of delivery, or promise of a receipt within a specified time, no good reason appears why a reply cable should have been suggested or required or a charge therefor exacted. Similarly, the wording of the advertisement with its assurance of *perfect security* lends color to the plaintiff's story, as corroborated by the witness who accompanied him to the bank, of the promise to return his money in default of proof, in receipt form, of its delivery. It is not claimed that a receipt was procured; and no proof is offered or suggestion made that the money was ever delivered.

Nor is the defendant helped by attempting to impute want of knowledge of the character and purpose of its charges to the paying teller of its foreign department with whom this particular transaction was conducted. This official's testimony shows that in addition to the regular charge, the further payment was made by plaintiff "for the quick transmission of the cable [*i. e.*, the money] supposedly." Here again



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we have an admission of a quick or expedited service based upon a payment in addition to the regular rates, thus lending corroborative weight to the plaintiff's story.

Against the right of plaintiff to a recovery, however, it is urged that judicial cognizance may be taken of supposed chaotic and unsettled conditions in Poland, whereby the plaintiff is prevented from offering proof of happenings there. Basis for this theory is sought to be furnished by the case of *Rosenblatt* v. *Josephson,* 172 N. Y. Supp. 719. This contention, however, cannot stand in view of the fact, of which judicial cognizance may equally be taken, that the internal conditions in the Polish republic do not permit, much less sanction, a finding of the state of anarchy referred to in the case just cited. As a matter of fact, the reverse is nearer the truth; for the internal conditions in that country have reached such a point of economic and political restoration to normal, that an apparently successful war is at the present time being waged by its army in the territory of a neighboring power. Furthermore, these conditions do not enter into the case, since plaintiff's right of recovery is placed on the definite agreement to refund his money upon failure, with a fixed time limit, to prove the actual transmission and receipt of the cable remittance.

On the measure of damage the case of *Strohmeyer & Arpe Co.* v. *Guaranty Trust Co.,* 172 App. Div. 16, is cited in the thought, apparently, that any recovery herein is limited, by the rule there laid down, to the present value of the foreign money which defendant was to transmit in exchange for plaintiff's payment of United States currency. That case, however, went expressly on the theory that *no failure to deliver* the money to its foreign destination was shown, but only a delay in making such delivery.

Here the claim of plaintiff is predicated upon a

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promise or agreement of delivery with proper proof thereof, within a definite period, or in default thereof, a refund of the amount paid.

In the view which the court entertains of the testimony, such an agreement is held established by the proof; and there must, accordingly, be judgment for the plaintiff in the full amount paid by him to the defendant.

Judgment for plaintiff.

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THOMAS CECIL CLARKE, an Infant, by his Guardian ad Litem, THOMAS G. CLARKE, Plaintiff, *v.* EIGHTH AVENUE RAILROAD COMPANY, Defendant.*

(Supreme Court, New York Trial Term, December, 1920.)

*Trial — inherent power of court to direct preference — Code Civ. Pro. § 793 — judicial discretion.*

MOTION for a preference.

R. Waldo MacKewan, for motion.

Michel Kirtland, opposed.

GAVEGAN, J. The legislature cannot deprive this court of its inherent power "to control its order of business and to so conduct the same that the rights of all suitors before" it "may be safeguarded." *Riglander* v. *Star Company*, 98 App. Div. 101; affd., 181 N. Y. 531. Where the reasons for preferring a cause develop after the term for which it was first noticed the court should nevertheless exercise its discretion and direct the preference. The affidavits here show satisfactorily why the motion was not noticed for the opening of the October term. On the showing made the discretion of the court should be exercised

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to promote justice and not to prevent it. It is asserted that the requirements of section 793 of the Code of Civil Procedure inhibit judicial consideration of the application because the motion was not so noticed, even though reasons which call for the exercise of the court's discretion developed after the notice of trial was served. If such was the intention of the legislature, it seems clear that the case cited above requires me to hold that the statute cannot have the effect intended. In the case of *Waters, Inc.*, v. *Hatters' Fur Exchange, Inc.*, 185 App. Div. 803, it was held that the ground on which the trial court had ordered the preference did "not afford a sufficient ground for granting a preference of the trial * * * under the inherent power of the court to control the order of the trial of issues on the calendar, which must now be deemed to be finally established." Hence the Appellate Division could not in that case have decided the question which arises here. For precedents in point see *Reinertsen* v. *Erie R. R. Co.*, 66 Misc. Rep. 229, and the cases there cited. The motion is granted and the cause ordered to be added to the day calendar for December 16, 1920.

Motion granted.

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LYMAN ROBINSON, Claimant, *v.* STATE OF NEW YORK.

Claim No. 14,875.

(State of New York, Court of Claims, January, 1921.)

*Damages — overflow of lands by reason of cloudburst — damages to crops resulting from negligence of state in operation of Barge canal, in addition to damage occurring from natural causes — claim dismissed.*

CLAIM for damages to crops growing on a farm due to the negligence of the state.

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Ernest F. Fox (Wilford T. Purchase, of counsel), for claimant.

John H. Clogston, deputy attorney-general, for state of New York.

CUNNINGHAM, J. In the year 1916, and for many years previously, the claimant worked the farm of his mother-in-law, Hattie Vanderbilt, "on shares," for two-thirds of the crops produced. He seeks to recover damages to crops growing on the farm in June, 1916, by flood alleged to be due to the negligence of the state, in the construction, maintenance and operation of the Barge canal.

The parties stipulated on the trial that all of the evidence in the claim of *George Bauer* v. *State of New York*, No. 14577, previously tried and determined in this court, be received in this case, which was done. The premises involved here are situated substantially the same as the land concerned in the *Bauer* claim. Our opinion in *Bauer* v. *State of New York*, 106 Misc. Rep. 1, includes an ample statement of the facts. Such additional evidence as was adduced on the trial of this claim will be referred to subsequently.

The principles of law applicable to the determination of the state's liability for the injury which occurred were fully discussed and expressed in our opinion in the *Bauer* case. We are convinced that these principles are firmly established and entirely sound. It is needless to repeat them here in detail. They leave for us in this case the determination merely of the issues of fact. The recent decision of this court in *Holland-Dale Garden Company, Inc.*, v. *State of New York*, 113 Misc. Rep. 219, is not to be misconstrued, because of the omission from it of a complete restatement of the principles to which we have referred, or by reason of the phraseology used. This court adheres fully to the rule stated in the *Bauer*

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opinion and in the cases there cited. There has been no tergiversation on our part in this respect.

It is well to state briefly the reasons which actuate us in reaching the result to which we come. This trial marked an effort on the part of counsel to supply evidence wanting in the *Bauer* case. Other claims growing out of the same transaction await trial and determination.

Two questions of fact only are to be solved:

(1) Did the negligence of the state result in any damage to the crops over, above and in addition to that which would have resulted from natural causes alone, in the absence of the intervening agency of the state; and

(2) What was the amount or extent of such damage, if any, resulting from the state's negligence, in addition to that which would have occurred from natural causes.

In the main, the new evidence presented by the claimant on this trial, bearing on the issue of liability, was to the effect that natural flood conditions in Mud creek, above the point of its influx to the Barge canal were worse and the water higher in May, 1916, than in June of the same year. That of the state, in effect, was that gauge readings taken at the Lyons lock of the Barge canal at any specific times will show with substantial accuracy the water elevation at the same times, in Mud creek at or near the premises here involved, due to the fact that Mud creek and the Barge canal reunite at the Lyons lock, and the water at that point in the canal and in Mud creek, near the claimant's premises, constitutes a pool standing at both points at a given time at substantially the same level. The state then established the gauge readings taken at the Lyons lock in the floods of the months of May and June, 1916, which indicated the maximum water elevation in the May flood to have exceeded that of the June flood, by

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seven-tenths of a foot. Such, therefore, is the state of the proof.

It is clear in this case, as it was in the *Bauer* case, "that there would have been a flood of greater or less magnitude, affecting the claimant's premises, on June 18, 1916, irrespective of the state's fault." There is no doubt that the lowlands in that vicinity always have been flooded in spring-time, by the natural rise of Mud creek, that the land involved in this claim is lowland, and that the rain storm and natural flood conditions in Mud creek above the Barge canal, in June, 1916, were unprecedented, with the exception of those which obtained in May of the same year. It follows that these premises would have been inundated in June, 1916, to some degree and for some duration, quite irrespective of any break in the canal bank.

It is beyond cavil that these lands were seriously and extensively flooded in May, 1916. This is established by the claimant's admission that six or six and one-half acres thereof were flooded at that time, his testimony that the road near the Cronise bridge, which is two feet higher than the land, was covered with water and by the specific evidence on the part of the state that the water elevation at this property in the May flood was seven-tenths of a foot higher than in the June flood. If it be the fact that in June the natural conditions in Mud creek were worse than in May, it is obvious that the state's negligence did not augment the flood at the claimant's premises, because the water elevation there was seven-tenths of a foot lower in June than in May. If the natural discharge in June was but slightly less excessive than in May, it is clear that the state's remissness produced a negligible effect, if any, because the difference in elevation of seven-tenths of a foot in Mud creek represents conditions at the claimant's premises substantially the same on both occasions. If natural conditions were

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practically the same in May and June, we conclude, likewise, that the state's negligence did not damage the crops to any appreciable extent, because, as we have stated, the water elevations at the claimant's land being practically identical on both occasions, were in accord with the natural conditions existing.

Although the testimony is practically balanced on this issue, if there be any preponderance, it is slightly to the effect that the June flood and water elevation above the Barge canal were higher than that in May. The witnesses who testified on this point were all apparently credible and about equal in number. Our own conclusion is that natural flood conditions in Mud creek were substantially identical on both occasions, and that the flood conditions at the premises in question were substantially the same at both times. If we are correct, then it is obvious that the state's negligence did not increase the injury, and it follows that the state is not liable under the principles of law, to which we previously have adverted, for any part of the loss.

In examining the facts in this case, it must not be forgotten that all of the water which emanated from the canal at the break found its only outlet to the claimant's premises through the culvert in the West Shore railroad embankment, which, of course, deterred it greatly and permitted only its gradual escape.

We have not discussed the claimant's status here arising from the fact that his only relationship to the loss is based upon the fact that he cultivated the land on shares. It seems to us evident that this would be important, were it not for the conclusion we have reached. Counsel did not discuss the proposition and we regard it as subordinate to the question of liability. The claim must be dismissed.

ACKERSON, P. J., concurs.

Claim dismissed.

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## JAMES J. PATANE, Claimant, *v.* THE STATE OF NEW YORK.

### Claim No. 16602.

(State of New York, Court of Claims, January, 1921.)

*Damages — liability of state for defective and unsafe canal bridge — absence of warning signs at either end as required by Laws of* 1917, *chap.* 472, §§ 129, 130 — *damages for loss of use of truck during repairs and for expense of repairs, allowed.*

CLAIM for personal damages due to the negligence of the state in constructing and maintaining a bridge over the old Erie canal.

Henry J. Crawford, for claimant.

Glenn A. Frank, deputy attorney-general, for the state.

MORSCHAUSER, J. Claimant presents a claim alleging that he sustained damages to personal property due to the negligence of the state in constructing and maintaining a bridge known as Lundrigan's bridge over the old Erie canal about a half mile south of the south line of the city of Watervliet in the county of Albany; and that said bridge was constructed and maintained in such a condition as to make the said bridge unsafe for automobiles and other vehicles to pass over the same; and that the state permitted the flooring and timbers of said bridge to become unsafe, rotten and defective; and that such condition existed without any warning to the public; and that it did not have upon either end a warning sign as required by sections 129 and 130 of chapter 472 of the Laws of 1917.

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Section 129 of chapter 472 of the Laws of 1917 requires the superintendent of public works when such bridge becomes weakened or unable to bear a load of twelve tons to post or erect conspicuously at each end of such bridge a sign stating the maximum capacity of such bridge and that the use of such posted bridge with a load beyond the stated maximum capacity resulting in damage to person or property shall be deemed contributory negligence upon the part of the person so using the same.

Under the Canal Law, section 47 of chapter 13, Laws of 1909, the state assumes liability for any injury to any person sustaining damages from the canals or from their use or management or resulting or arising from the neglect or conduct of any officer of the state having charge thereof.

The claimant on the day in question was crossing said bridge over the old Erie canal with a truck and load weighing in all six tons. The truck broke through the flooring of the bridge and rested on the lower timbers of the bridge, and the automobile which was being driven by claimant at the time was more or less injured and damaged.

Upon the trial the claimant gave evidence tending to show that the timber of the bridge was rotten and dozy, and unsafe and in a dangerous condition. This was denied by the witnesses for the state. The claimant also produced evidence upon the trial by himself, and other witnesses who live in the neighborhood of the bridge, and persons who were present at the accident, that there were no warning signs as required by law at either end of the bridge. The state gave evidence upon the trial by a number of its employees that these signs were up and that they had observed them from time to time; but all the witnesses, both for the state and the claimant, agree that the next day

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after the accident there was no warning sign at either end of the bridge.

We believe from the testimony that the bridge was defective and the timbers rotten. The state's witnesses who were mostly employees in the service of the state testified that one of their duties required them to report the absence of such signs at bridges, and that they frequently noticed the sign on this bridge, and that within a short time of the accident the signs were on the bridge located as required by law. There are about thirty bridges under the care and management of the division in which this bridge is located, and these employees had to do more or less with all of these bridges. They had many duties to perform. Most of them were laborers; and it seems rather incredible to the court that they should pay strict attention to warning signs in connection with their other duties. If their testimony is to be believed this court would have to find that the claimant or someone in his behalf was dishonest and corrupt enough immediately after the accident to remove both signs for the purpose of establishing a claim. The claimant did not impress us as a person of that character; and it is doubtful whether he had any thought at that time of a claim or anything else except to save his automobile and the load. A large number of witnesses who were disinterested and had no reason to testify falsely and had no interest in the claimant, and who were strangers to him, testified that they frequently crossed and recrossed this bridge, some of them living in the immediate neighborhood of the bridge, and that there were no warning signs and had not been for a long time prior to the date of the accident.

We are inclined to think that there was no warning sign at either end of the bridge at the time of the

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accident to the claimant, and that the bridge was defective and the timbers somewhat decayed.

The claimant claims $441.22 for repairs to the truck; depreciation in value to the truck $500, and loss of the use of the truck for fourteen days at $25 a day, $350.

We think the claimant is entitled to recover the money he expended for repairs in restoring the truck to its condition as it existed immediately before the accident; and he is also entitled to be paid for the loss of the use of the truck during the time it was being repaired, but we do not believe that the claimant is entitled to recover for the item of depreciation in value of the truck. The claimant could recover damages, the amount being the difference between the market value of the truck before and after the injury; or he could recover the costs of reparation and the loss of the use of the car. The usual measure of damages in cases of that kind is the difference in market value of the car immediately before and after the accident, and expenses from the injury; or the costs of reparation and the reasonable value of the use of the truck during the time it was being repaired. We do not believe that the claimant could recover both the depreciation in value and also the costs of reparation. We do not think that the claimant should be allowed to recover for the cost of complete restoration of the car and the use of the car while being repaired, and in addition thereto the depreciation in value. The truck was completely repaired, the cost of which he is allowed, and he is also allowed for the use of the truck while it was not in operation. We think this is all that the claimant is entitled to. The damage to the truck was stated by the claimant and the repair man, and it appeared from the testimony of the mechanic who repaired the truck that it was repaired and was fully as good after it was repaired as it had been before the

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accident. The amount of depreciation in value of the car before and after was stated by a person who was interested; and we doubt the correctness of his opinion, and are not inclined to believe that the damage was to the extent that he stated.

Therefore, the claimant should receive the moneys expended by him in the repair of the truck amounting to the sum of $441.22, and the loss of use of the truck for fourteen days at $25 a day amounting to $350, a total of $791.22.

Judgment is, therefore, ordered for the sum of $791.22.

ACKERSON, P. J., concurs.

Judgment accordingly.

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ELBERT E. COOLEY, Claimant, *v.* THE STATE OF NEW YORK.

Claim No. 16563.

(State of New York, Court of Claims, January, 1921.)

*Bridges — accidental injury received by being struck by lift gates of canal bridge — damages for loss of wages and for medical expenses awarded.*

CLAIM for damages for negligence.

Thomas F. Powers, for claimant.

Glenn A. Frank, deputy attorney-general, for state.

MORSCHAUSER, J. The claimant files a claim to recover damages by reason of an accident which happened to him on the 12th day of November, 1919, by being struck by certain lift gates constructed and

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maintained on a certain bridge spanning the Erie canal at Nineteenth street near Second avenue in the city of Watervliet, Albany county, N. Y. On the day in question the claimant was driving an automobile across said bridge, and as he was about to approach the west side of said bridge proceeding in a westerly direction, the gates were lowered and in coming down struck the windshield of the car in which the claimant was riding, and came in contact with the claimant's body whereby he was injured in his breast and shoulder, and he received a fracture of the index finger of his left hand. The finger, from the effects of the injury, was left somewhat crooked. The claimant was confined to his house for five weeks; his doctor's bill was $100; and he lost substantially $100 in salary. He suffered more or less pain during the time and now claims that he is not able to raise his arm above the shoulder, and he still feels the effects of the injury. Two physicians testified; one a physician who attended the claimant, and one physician who was called by the state who had examined the claimant. The physician for the claimant stated that in his opinion the injuries to the claimant were permanent, while the physician called by the state gave his opinion that there was no permanent injury, and that the claimant had substantially recovered, and upon his examination of the claimant found no indications of any physical injuries except the condition of the finger of the left hand.

The claimant testified upon the trial that while approaching the bridge he heard no gong or other alarm, and in this he was corroborated by several other witnesses who testified that they saw the accident and heard no alarm given just before the gate came down; that the gate came down after the claimant had crossed the bridge, dropped suddenly and struck the car in which claimant was riding, and injured the claimant. The gate tender was called by

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the state; and he testified that the gong was sounded; that he looked both ways and did not see the car approaching. He had an unobstructed view in each direction for some distance, and testified that at no time did he see the car in which the claimant was riding. It is very evident from the testimony that no gong was sounded, and that the gate tender did not make any observation before he lowered the gates, and that he was careless in the operation of the gates at that time.

Under the Canal Law, section 47, chapter 13, Laws of 1909, the state assumes liability to any person sustaining damages from the canals or from their use or management or resulting or arising from the neglect or conduct of any officer of the state having charge thereof or resulting or arising from any accident or other matter or thing connected with the canals, the amount of such damage to be ascertained and determined by the proper action or proceeding before the Court of Claims; but no judgment shall be awarded by such court for any damages in any case unless the facts proved therein make out a case which would create a legal liability were the same established in evidence in a court of justice against an individual or corporation.

We are inclined to think from the evidence that the injury to the claimant, while somewhat painful, was in no way permanent except to the extent that his index finger was, after it healed, left in a slightly crooked condition; but from the statement of the claimant himself, this in no way affected the use of the finger.

The claimant, after five weeks, went back to work, and since then has been carrying on his usual vocation. We think the claimant should receive his wages while he was confined to the house, which amount to $100, his doctor's bill which amounts to $100; and

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we think that $400 would be a fair amount to pay him for the suffering and inconvenience that he received by reason of the accident.

Claimant is, therefore, allowed the sum of $600.

ACKERSON, P. J., concurs.

Claim allowed.

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Matter of the Petition of WILLIAM C. PRIME, as Referee, Petitioner, to Register the Title to Certain Lands.*

(Supreme Court, Kings Special Term, February, 1921.)

*Real Property Law*, § 378(3)—*registration of title.*

PETITION to register title to lands.

Gilbert F. Kennedy, for petitioner.

Charles D. Newton, attorney-general, for state of New York.

J. Tyson McGill, official examiner, Kings county.

ASPINALL, J. In my opinion the referee in this proceeding has the power of disposing in fee simple of the legal estate in land under subdivision 3 of section 378 of the Real Property Law, and I, therefore, confirm the report of the official examiner of titles as referee and direct that a final decree and judgment of registration be entered.

Ordered accordingly.

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* Reported by request.— [REPR.

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# INDEX.


**ACCORD AND SATISFACTION.**

*What not an — Written order for goods — Parol evidence of unwritten acceptance.*—Upon the trial of an action to recover the unpaid balance of the agreed price of goods to be manufactured, sold and delivered, evidence was given in support of the allegations of the complaint. During the cross-examination of defendant there was received in evidence an agreement to compromise the dispute between the parties which had been pleaded in the answer as a defense and bar. The plaintiffs then rested their case and a motion by defendant to dismiss the complaint on the sole ground that said agreement established an accord and satisfaction and was therefore a bar to the action, was granted. *Held,* that plaintiffs, having made out a *prima facie* case, it was error to dismiss the complaint as manifestly the agreement was merely an accord and not an accord and satisfaction. The agent of plaintiffs testified that as the result of conversations defendant's treasurer gave him written orders which stated fully the style of goods, the price and a time within which deliverv was to be made and also the terms of payment. When the witness was asked whether, at the time he received the order, anything was said by him to defendant's treasurer with reference to the time of delivery, the court excluded the testimony on sustaining the objection of defendant's counsel that oral evidence was being offered to vary a written instrument. *Held,* that in the absence of evidence in writing of plaintiffs' acceptance of the order, the exclusion of the testimony was error. Potter v. Kurlander Bros. & Harfield Cloak & Suit Co., 117.

**ACCOUNTING.**

*Testamentary trustees — Wills — Real estate.*— Upon the accounting of testamentary trustees, about thirteen years after the death of their testator, as to unproductive and unimproved real estate situated in a sister state, which though they were in duty bound to sell they still held undivided, the annual taxes and carrying charges are properly chargeable to and should be paid with interest out of the principal. Upon a future accounting after a sale of the real estate within six months from the date specified in an order directing the trustees to sell, they may be reimbursed from the proceeds of the sale. Matter of Lichtenberg, 89.

See **Gifts.**

**ACTIONS.**

1. *When may not be maintained by alleged "next friend" of a lunatic — Marriage — Default — Evidence — Parties — Code Civ. Pro.* § 1748.—An action by the "next friend" of a lunatic as permitted by section 1748 of the Code of Civil Procedure, should be brought and prosecuted in the name of the "next friend" and not




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**ACTIONS — Continued.**
in the name of the lunatic. Upon a petition setting forth the alleged insanity of a wife an order was made and entered appointing petitioner as "next friend" for the purpose of maintaining an action for the annulment of the marriage of plaintiff to defendant. Upon application for judgment as by default it appeared in answer to questions asked by the court, that the petition was presented and the action brought at the request of defendant and that instead of being the "next friend" of the wife, the plaintiff all the time had been acting as the "next" and best friend of the defendant. *Held*, that the application for judgment should be denied. Where, notwithstanding queer and peculiar acts on the part of the wife shortly after the marriage, it appears that they lived together for four years before she was declared insane, and had two children, and the evidence does not justify a finding that she did not at the time of the marriage understand the nature, effect and consequences thereof, the annulment will be denied even though all other reasons for rejecting the application for judgment should fail. The order in this case "that an action may be maintained" by plaintiff as "next friend" did not authorize the bringing of the action by him without making the wife a party defendant. Kemmelick v. Kemmelick, 198.

2. To recover money paid to secure remittance in Poland — Damages for non-delivery to designated payee — Judgment for plaintiff. — Wasserman v. Irving National Bank, 704.

See **Deeds; Insurance (Life); Pleading.**

**ADJOINING OWNERS.**

1. *Establishing title — When lot owner cannot take forcible possession of a disputed strip of land — Deeds — Injunctions — Ejectment — Code Civ. Pro.* § 968.— A lot owner, except by virtue of a judgment in a proper action establishing his title, cannot take forcible possession of a disputed strip of land claimed by an adjoining lot owner. Where in an action between adjointing lot owners on a city block to determine the title to a strip of land to which plaintiff claims title by adverse possession, it appears that the properties of both parties are about two feet off the line as given in their respective deeds, a permanent injunction will be granted restraining the defendant from moving a building onto the disputed strip after he had torn down the division line fence. The remedy of the defendant is an action of ejectment in which, under section 968 of the Code of Civil Procedure, he, as plaintiff, would have the right to have the issues framed tried by a jury. Rzepecka v. Urbanowski, 30.

2. *Falling branch of tree — When action for trespass will not lie.* — Where during a storm of unusual violence one of the limbs of a tree on defendant's land was so broken that it overhung plaintiff's land, the mere fact that defendant's agent, an experienced man, went upon plaintiff's land and in attempting in a proper manner to remove the limb, which as a result of his weight and movements in the tree had fallen upon plaintiff's house, doing damage, does not constitute an actionable trespass, and defendant's motion for a dismissal of the complaint will be granted. Kank Realty Co. v. Brown, 357.

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**ADOPTION.**

*When application by second husband of moth her child will not be granted against the opposit Divorce — Husband and wife — Domestic Relati* — The statute (Domestic Relations Law, § 111(3) the consent of a parent who has been divorced b cruelty or adultery is unnecessary in adoption where in a wife's action for a divorce she was a of her six-year-old daughter with provision that t be entitled to visist her once a week, an applicat of the mother for the adoption of the child w against the opposition of the father, as the effe adoption would be to terminate, without legal rights of the father. Matter of Metzger, 313.

**AFFIDAVITS.**
See **Transfer Tax.**

**AGENCY.**
See **Bill of Particulars.**

**ALIEN ENEMIES.**
See **Executors and Administrators.**

**AMENDMENTS.**
See **Pleading.**

**ANIMALS.**
See **Injunctions.**

**ANNUITIES.**
See **Wills.**

**APPEAL.**
See **Summary Proceedings.**

**ARREST.**

*When motion to vacate an order of, denied Bail — Code Civ. Pro.* §§ 550, 575.—An undertak under sections 550 and 575 of the Code of Civi defendant in an action for separation, is in the bail to insure the payment of alimony as provided and defendant's motion to vacate the order of charge the undertaking on the ground that the and a decree entered will be denied. Sturges v.

**ASSIGNMENTS.**
See **Judgments; Transfer Tax.**

**ASSOCIATIONS.**
See **Transfer Tax.**

**ATTACHMENT.**
See **Contracts.**

**ATTORNEYS.**
See **Judgment.**

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**BAIL.**

See **Arrest.**

**BAILMENTS.**

*Action to recover value of contents of a trunk — Evidence — When complaint dismissed.*— Plaintiff who, with her husband, was about to leave defendant's hotel where they were guests, with the intention of returning in a few days, upon being informed by defendant's manager that their trunks would be taken care of during her absence, a trunk in which among other articles was placed a diamond pendant valued at more than $1,000 was delivered to defendant for storage. When on plaintiff's return the trunk was sent to her room and opened the pendant was missing. In an action to recover its value it was conceded that the relation between the parties was that of bailor and bailee, but there was no evidence that defendant had actual notice that the pendant was in the trunk. *Held*, that the dismissal of the complaint upon the ground that defendant, by becoming the bailee of the trunk and its contents, was not required to and did not assume that the trunk contained articles other than those ordinarily contained in trunks, and that in consequence there was no bailment as to the pendant, was proper. Waters v. Beau Site Co., 65.

See **Negligence.**

**BANKS AND BANKING.**

*Negotiable instruments — When temporary injunction granted by court of sister state has no extra-territorial effect.*— Defendant, a Massachusetts corporation, by a letter of credit issued by it agreed with the drawers and indorsers and *bona fide* holders of drafts drawn thereunder and in compliance therewith that such drafts would be duly honored upon due presentment if accompanied by the documents mentioned in the letter of credit. In an action upon a draft drawn under the letter of credit and delivered to plaintiff, a resident of the State of New York, for a valuable consideration, it was uncontroverted that no part of plaintiff's duties in respect of any contractual relation arising from an assignment of the credit, assented to by defendant in writing, and negotiations of the draft, remained unperformed. *Held*, that an injunction *pendente lite* purporting to have been granted by the Superior Court of Massachusetts, restraining defendant from making payment under the credit had no extra-territorial force or effect in the courts of the State of New York, and was no defense to the action, it appearing affirmatively from the answer of defendant, that the plaintiff herein was not a party to that action, and plaintiff's motion for judgment on the pleadings, will be granted. The defense sought to be established gave no ground under the true rule of judicial comity warranting recognition in our courts, since the result would be to utterly defeat the acknowledged rights of the plaintiff and deny it its day in court, and be entirely contrary to the judicial decisions in this state, that a letter of credit is a complete and independent contract. National Park Bank v. Old Colony Trust Co., 127.

BILL OF PARTICULARS.

*Who entitled to — Pleading — Commissions — Agency.*— A bill of particulars is unnecessary when the complaint is sufficiently specific. Where the gist of a complaint is that on an unspecified date it was

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**BILL OF PARTICULARS** — Continued.
agreed that plaintiffs' commission on a sale to the French government, alleged to have been negotiated by plaintiffs on behalf of defendants, should be a certain fixed proportion of the purchase price, the plaintiff may properly be required to give a bill of particulars in regard to immaterial matters which by pleading he has assumed or admitted are material. The gist of the defense, so far as material, was that one of the defendants was merely acting as agent of the other in the transaction. *Held,* that an apparent admission of an allegation of the complaint, that it was agreed between plaintiff and defendants, by an allegation of the answer that it was finally agreed with plaintiff, by the defendant for whom the other defendant was acting, that plaintiff's commission should be, etc., was really a denial of said allegation of the complaint, it being admitted only that an agreement was made with but one of the defendants. The answer containing nothing to indicate that the date of the agreement admitted by the answer was the same as that set up in the complaint, defendants were entitled to a bill of particulars to the end that they may be apprised of the date when plaintiff claims both defendants entered into the agreement, and also of all other appropriate particulars thereof sought by defendants. Adams v. Dodge, 565.

**BILLS, NOTES AND CHECKS.**
See **Negotiable Instruments.**

**BONA FIDE PURCHASE.**
See **Conversion.**

**BRONX COUNTY COURT.**
See **Costs.**

**BRIDGES.**
Accidental injury received by being struck by lift gates of canal bridge — Damages for loss of wages and for medical expenses awarded.— Cooley v. State of New York, 717.

**CANCELLATION CLAUSE.**
See **Lease.**

**CARRIERS.**
See **Negligence; Pleading.**

**CERTIORARI.**
*Taxes — Debt due from United States not exempt — When proceeding to review an assessment for personal property will be dismissed — United States Revised Statutes,* § 3701 — *Tax Law,* § 2(8).— The unpaid balance of a debt which was due and owing from the United States, on October 1, 1919, on certain war contracts fully performed, is not exempt from taxation under section 3701 of the United States Revised Statutes but is an asset subject to municipal taxation under section 2(8) of the Tax Law of the state, for the year 1920, as a debt due from a solvent debtor, and proceedings on a writ of certiorari under section 12 of the Tax Law,

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**CERTIORARI — Continued.**
to review an assessment which disallowed the deduction of such a debt, will be dismissed. People ex rel. Astoria Light, Heat & Power Co. v. Cantor, 419.

**CITATION.**
See **Surrogates' Courts.**

**CIVIL RIGHTS LAW.**
§§ 50, 51, Pfaudler v. Pfaudler Co., 477.

**CLAIMS.**
See **Damages; Highways.**

**CONDITIONAL SALES.**
See **Contracts.**

**CODE OF CIVIL PROCEDURE.**
§ 382(5), Model Building & Loan Assn. v. Reeves, 137.
§ 440, Berman, Inc. v. American Fruit Distributing Co., 345.
§§ 550, 575, Sturges v. Sturges, 475.
§ 723, Buckley v. Sharpe, 206.
§ 793, Clarke v. Eighth Ave. R. R. Co., 707.
§ 829, Matter of Kolb, 361.
§§ 870, 872, Rittenberg v. Barrett, 167.
§ 968, Rzepecka v. Urbanowski, 30.
§ 984, Block v. Bacon Coal Co., 54.
§§ 1646, 1679, Kussold v. Behrman, 682.
§ 1748, Kemmelick v. Kemmelick, 198.
§ 1771, Lesser v. Lesser, 701.
§ 1836a, Woolley v. Hutchins, 11.
§§ 1919, 1923, Skolny v. Hillman, 571.
§ 2231(1-a), Jackson v. Grey, 92.
§§ 2564, 2565, 2588(3), Matter of McOwen, 151.
§ 2596, Matter of Burnham, 455.
§ 2649, Matter of McGuire, 81.
§ 2670, Matter of Shulenburg, 155.
§ 2679, Matter of Goodwin, 39.
§§ 2680, 2681, Michaels v. Flach, 225.
§ 2697, Matter of Miller, 283.
§ 3268, Tobias Tile Co., Inc., v. Topping Realty Co.. Inc., 500.

**CODE OF CRIMINAL PROCEDURE.**
§§ 285, 684 — *Motion after judgment of conviction for inspection of grand jury minutes denied — Waiver of rights.*— Sections 285 and 684 of the Code of Criminal Procedure refer only to imperfections of form and departures from the form or mode of procedure prescribed by said Code, or to errors or mistakes in form or in mode of procedure, and are not broad enough to warrant disregarding the violation of a constitutional right. After his conviction for murder in the first degree, the defendant's motion for an inspection of the minutes of the grand jury for the sole purpose of making a motion to dismiss the indictment, on the ground that there was no evidence before the grand jury to connect him with the crime charged, except that of accomplices, will be denied on the ground

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**CODE OF CRIMINAL PROCEDURE** — Continued.
that not having been made prior to the judgment of conviction the defendant had waived his right to make the motion. People v. Giordano, 62.

**CODE OF ORDINANCES OF CITY OF NEW YORK.**
Art. 8, chap. 14, People ex rel. Hultman v. Gilchrist, 651.

**CONSIDERATIONS.**
See **Mortgages.**

**CONSPIRACY.**
See **Injunctions.**

**CONSTITUTIONAL LAW.**
*Unconstitutionality of Laws of* 1919, *chap* 459 — *Contracts* — *Statutes* — *Jurisdiction* — *Court of Claims* — *State Constitution*, art. III, §§ 19, 28.— Chapter 459 of the Laws of 1919, in terms conferring upon the Court of Claims jurisdiction to hear claims of certain highway contractors for losses due to increased cost of labor, material and transportation of material resulting from war conditions, is in violation of section 19 of article III of the state Constitution providing that the legislature shall neither audit nor allow any private claim or account against the state; and it is also in violation of section 28 of the same article providing that the legislature shall not grant any extra compensation to any contractor. An advertisement for letting of a highway contract was published once between April 6 and April 17, 1917, namely, on April 16, 1917. The date therein advertised for the letting was May 7, 1917. Claimant's bid was dated May 7, 1917, and the contract was executed on May 9, 1917. *Held*, that the contract did not come within the terms of chapter 459 of the Laws of 1919. The words in section 6 of the act "advertised for letting between April 6, 1917, and April 17, 1917," relate to the advertised date of letting and not to the date of advertising. Dale Engineering Co. v. State of New York, 233.

See **Statutes; Transfer Tax.**

**CONSTRUCTION.**
See **Lease; Statutes; Wills.**

**CONTRACTS.**
1. *What constitutes* — *Warehousemen* — *Receipts* — *Negotiable instruments* — *Pleading* — *General Business Law*, § 91.— A provision in a warehouse receipt that the goods were to be stored in a particular warehouse constitutes a contract that they shall remain there and no change can be made except by consent of the holder of the receipt. After a negotiable warehouse receipt, conforming to section 91 of the General Business Law, had been given by defendant for goods stored in one of its warehouses, it was indorsed and delivered to one to whom the goods were sold, and the buyer, upon the sale of the same to plaintiff, indorsed and delivered to the purchaser the warehouse receipt. Without the consent of plaintiff or any of the holders of the warehouse receipt the goods were removed

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**CONTRACTS** — Continued.
to another warehouse and there destroyed by fire. In an action to recover on the warehouse receipt defendant by its answer admitted its receipt of the goods and the issuance of the warehouse receipt. *Held,* that a separate defense that defendant notified the one who stored the goods that it desired to remove them from the place described in the receipt, and that if defendant did not receive any word of objection to such course, the transfer would be made, was subject to a demurrer. Childs Co., Inc. v. P. Reardon, Inc., 178.

2. *When action cannot be maintained against third person for damages for breach of contract to marry — Pleading — Fraud — When motion for judgment on the pleadings granted.*— A party to a contract to marry cannot maintain an action for general damages against a parent or other person who even maliciously induces the other party to break the contract, unless fraud or other tortious means be employed. A demurrer to a complaint which alleged *inter alia* that plaintiff incurred great expense in anticipation of his marriage to defendant's daughter and had suffered damages in the sum of $10,000 by reason of the deprivation of the companionship, society, love and affection of his fiancee, sustained with leave to serve an amended complaint and defendant's motion for judgment on the pleadings granted. Guida v. Pontrelli, 181.

3. *Delay in delivery of goods — Rescission — Evidence.*— The rule that while delay in the performance within a reasonable time of a contract calling for successive deliveries of goods may give rise to a cause of action for damages it will not always permit rescission, does not apply to an executory contract of sale where delivery within a reasonable time is a concurrent condition to any obligation of the buyer to accept and pay and where the time to perform such condition has expired before notice of rescission was given. More than four months after the making, on September 13, 1918, of a contract for the sale and delivery of certain iron, and at a time when plaintiff was not ready to deliver the goods, defendants in writing cancelled the order, and while the testimony on behalf of plaintiff in an action for damages tended to show that the average time in which it was possible to secure delivery of goods called for by the contract, during the war, was from four to five months, one of the defendants testified that plaintiff stated that it could deliver the goods within four or five weeks. *Held,* that a finding that on January 16, 1919, when the order was cancelled because of plaintiff's delay, more than the reasonable time contemplated for the delivery of the goods had elapsed, was warranted. The trial court having found upon proper evidence that plaintiff did not deliver the goods within a reasonable time, as required by the contract of sale, the plaintiff had no right of action for damages, and a judgment dismissing the complaint upon the merits will be affirmed. Chemung Iron & Steel Co. v. Horn, 380.

4. *Action for breach of a contract of shipment — Foreign stock corporations — Interstate commerce — Stock Corporation Law,* § 15. — In an action by a foreign stock corporation for breach of a contract of shipment from one state to another, no question under section 15 of the Stock Corporation Law of the state of New York

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**CONTRACTS** — Continued.
is properly in the case. Publicker Commercial Alcohol Co. v. Roberts, 551.

5. *Equitable interpretation — Pleading.*— In the interpretation of a contract the court will endeavor to give it the construction most equitable to both parties instead of a construction which will give one of them an unfair and unreasonable advantage over the other. Kavanaugh v. Cohoes Power & Light Corp., 590.

6. *When consignment of merchandise upon conditions not conditional sale — Title in consignor — Attachment — Conversion — Damages — Personal Property Law,* § 62.— An agreement for the consignment of merchandise upon conditions therein stated is not such a contract for the conditional sale of goods and chattels as is required, by section 62 of the Personal Property Law, to be filed. Under such an agreement the title to the goods remains in the consignor and they are not subject to attachment by a creditor of the consignee. Where a sheriff's jury finds that certain goods, when attached in an action against the consignee, were the property of the consignor, the plaintiff, in an action against the sheriff or his surety on a bond for a return of the goods, for a wrongful conversion, is entitled to recover as damages the highest value of the goods between the time of the conversion and the trial of the action. Plymouth Rubber Co. v. Knott, 695.

See **Constitutional Law**; **Insurance (Life)**; **Mandamus**; **Parties**; **Pleading.**

**CONTRACTS FOR TOWAGE.**
See **Ships and Shipping.**

**CONVERSION.**
*Check — Delivery to wrong person by mistake — Bona fide purchaser — When drawer of check as assignee of proper payee acquires no title — Negligence of drawer proximate cause of loss.* — To maintain an action for conversion the plaintiff must have some title to or interest in the property alleged to have been converted. In an action for the alleged conversion of a check and the proceeds thereof drawn by plaintiff it appeared by the agreed statement of facts that by mistake the check was forwarded, not to the payee, but to another customer of plaintiff having the same name, upon whose indorsement of the check the amount thereof was paid to him by a bank in the belief that he was the proper payee. *Held,* that the alleged proper payee of the check, who received nothing, acquired no title to or interest therein, and that plaintiff as his assignee had no right of action for the conversion of the check against the defendant bank, which after collecting the check from the bank on which it was drawn transmitted the proceeds to the bank which had cashed the check. The negligence of the plaintiff or its agent delivering the check to the wrong person, thus enabling him to pass an indefeasible title to a *bona fide* purchaser, was the proximate cause of the loss which plaintiff must bear rather than defendant which parted with its money in absolute good faith. Slattery & Co. v. National City Bank, 48.

See **Contracts**; **Pledge.**

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**CONVEYANCES.**

***Reservation of rent and right of re-entry for nonpayment in perpetual leases creates an estate upon condition — Relationship of landlord and tenant — Tenant estopped from asserting rights by prescription.*** — In an action by the purchaser from the tenant of lands held under such perpetual leases, where the tenant had defaulted in the payment of the rent and the landlord and tenant had entered into a contract, after such default of which the purchaser had knowledge, *held*, that the rights of the purchaser were determined by the contract which, fairly construed, limited the purchaser to the amount of water power fixed in the leases and described in the contract and excluding certain excess water power claimed by prescription and estoppel, and that defendant was entitled to a dismissal of the complaint and to an affirmative judgment on its counterclaim cancelling and annulling the leases pursuant to such contract. Where a conveyance of land to the grantee, his executors, administrators and assigns forever, contains a reservation of perpetual rent, and the right of re-entry for non-payment, the estate created is upon condition and not in fee simple. Such a conveyance creates the relationship of landlord and tenant, and the tenant is estopped from asserting any rights by prescription. Kavanaugh v. Cohoes Power & Light Corp., 590.

**CORPORATIONS.**

1. ***Service of process on foreign — General Corporation Law, § 16 — When affidavit of service of summons and complaint insufficient — Vacating judgment taken by default on such an affidavit.*** — The statute (General Corporation Law, § 16) requires a foreign corporation doing business in this state to make and file in the office of the secretary of state a designation of the person upon whom service of process against the corporation may be made in this state. Where with due diligence the plaintiff in an action against such a corporation, which has complied with section 16 of the General Corporation Law, could have ascertained the name of the person designated for the purpose required by the statute, and the affidavit upon which a default judgment was granted, states that service of the summons and complaint was made on the managing agent of the defendant within this state, an order denying a motion to vacate and set aside the judgment, on the ground that the papers were not properly served, will be reversed, with costs, and the motion granted, with costs. Taplinger & Co. v. Ward & Co., 115.

2. *Membership — Lack of power of officer to contract for life employment.* — While an agreement made by an agent of a corporation is not to be condemned, yet in the absence of an express authorization of or a ratification of the agent's acts, the agreement cannot be upheld. Certain funds of a membership corporation were awarded to its secretary and treasurer for disbursement under the direction of the trustees, to pay for psychical research work and salaries of employees in connection therewith. *Held*, that the secretary and treasurer had no power to make a contract of employment with plaintiff as office manager for the term of his life. Such a contract is unenforcible and where, not only from the oral testimony but from letters written by plaintiff to the secretary and others, the conclusion is irresistible that no such agreement was made, a

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**CORPORATIONS** — Continued.
compromise verdict in favor of plaintiff will be set aside as against evidence and the weight of evidence, and the complaint dismissed. Greaves v. American Institute for Scientific Research, 413.

See **Contracts; Negotiable Instruments; Pleading; Wills.**

**COSTS.**

*Bronx County Court—When security for costs not required—Code Civ. Pro.* § 3268 — *Bronx County Act* (*Laws of* 1912, *chap.* 548).— A domestic corporation, whose principal place of business is in the city of New York, as plaintiff in an action brought in the County Court of Bronx county against one of its residents, may not be required to give security for costs under section 3268 of the Code of Civil Procedure. Section 3268 of the Code of Civil Procedure and the "Bronx County Act" (Laws of 1912, chap. 548) must be read together, and a motion to vacate an order requiring the plaintiff to file security for costs will be granted. Tobias Tile Co., Inc. v. Topping Realty Co., Inc., 500.

**COUNTERCLAIM.**

*Landlord and tenant — Failure to give possession — Damages — Evidence.*— Where in an action to recover rent of an apartment under a written lease the evidence justifies a finding that because of the acts of the landlord, its contractors and servants, the tenant was not given possession of the apartment on time, he is entitled to counterclaim his damages for the time he was kept out of possession. Where the court refused to submit the counterclaim to the jury and directed a verdict in favor of the landlord for the amount of rent claimed, the judgment entered on the verdict will be reversed and a new trial ordered. 163 East 36th St. Corp. v. Stockbridge, 98.

See **Pleading; Sales.**

**COUNTY LAW.**

§ 12(14) Matter of Seeley, 633.

**COURT OF CLAIMS.**

*Jurisdiction — Banks — Claims — State — Statute of Limitations — Laws of* 1919, *chap.* 581.— The statute (Laws of 1919, chap. 581) conferring jurisdiction upon the Court of Claims to hear, audit and determine the claims of the depositors and creditors of two certain banks against the state, for damages sustained through the failure of said banks and each of them, declares in unequivocal language that it cannot be used to create any liability, and it expressly permits the state to interpose any legal or equitable defense, except the Statute of Limitations. Where a claim is prosecuted under said statute upon an allegation that the failure of the banks was due to the tortious and negligent acts of the officers, agents and servants of the state, the defense that the state is not liable therefor must be given its legal effect, which is, that it is a complete answer to the claim. Sherlock v. State of New York, 491.

See **Constitutional Law.**

**COVENANTS.**

See **Lease.**

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**CRIMINAL CONSPIRACY.**
See **Indictments.**

**CRIMINAL LAW.**
See **Code of Criminal Procedure.**

**CUSTOM AND USAGE.**
See **Ships and Shipping.**

**DAMAGES.**
1. Overflow of lands by reason of cloudburst — Damages to crops resulting from negligence of state in operation of Barge canal, in addition to damage occurring from natural causes — Claim dismissed. Robinson v. State of New York, 708.

2. Liability of state for defective and unsafe canal bridge — Absence of warning signs at either end as required by Laws of 1917, chap. 472, §§ 129, 130 — Damages for loss of use of track during repairs and for expenses of repairs, allowed. Patane v. State of New York, 713.

See **Bridges; Contracts; Sales.**

**DECEDENT ESTATE LAW.**
§ 35, Matter of Cutler, 203.
§ 35, Matter of Gaffken, 693.
§§ 44, 45, 47, Woolley v. Hutchins, 11.

**DEEDS.**
*When plaintiff entitled to judgment declaring the instrument null and void — Actions — Statute of Wills — Gifts.*— By a writing in the form of and acknowledged as a deed, the grantor quit-claimed to her husband, to whom the instrument was delivered on the day of its date, all real estate of which she should die seized, and also assigned to him all of her personal property. By the instrument, she reserved full control and dominion over her property, and it was left entirely discretionary with her whether at her death anything should be left to her grantee. *Held,* that in an action by the brother and only next of kin of the grantor, to have the instrument annulled on the ground that it was an attempt by the grantor to dispose of her property in a form and manner contrary to the Statute of Wills, plaintiff was entitled to a judgment declaring the instrument null and void. The instrument, in the circumstances disclosed, can be sustained neither as a gift *inter vivos* nor as a gift *causa mortis.* Butler v. Sherwood, 483.

See **Adjoining Owners.**

**DEFAULT.**
See **Foreclosure.**

**DEPOSITIONS.**
*When motion to vacate order for examination before trial denied — Express companies — Joint stock associations — Parties — Code Civ. Pro.* §§ 870, 872.— Where the defendant in an action brought against him as president of an express company, which, by not denying in his verified answer he admits is a joint stock association

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**DEPOSITIONS** — Continued.
of which he is the president, and the moving
an order for his examination before trial as pre
company "or any other officer" of the compa
such facts and circumstances as show the mate
of the testimony sought, a motion to vacate the
but the order will be modified to the extent
words "or any other officer." The defendant,
the express company, was the "party to the
meaning of sections 870 and 872 of the Code
Rittenberg v. Barrett, 167.

**DEPOSIT.**
See **Pleading.**

**DIVORCE.**
See **Adoption.**

**DOMESTIC RELATIONS LAW.**
§ 70, Lesser v. Lesser, 701.
§ 111(3), Matter of Metzger, 313.

**DOMICILE.**
See **Transfer Tax.**

**DOWER.**
See **Exemptions.**

**ELECTION.**
See **Landlord and Tenant.**

**EQUITABLE CONVERSION.**
See **Wills.**

**EQUITABLE INTERPRETATION.**
See **Contracts.**

**EQUITY.**
See **Mortgages.**

**ESTATES IN EXPECTANCY.**
See **Transfer Tax.**

**ESTOPPEL.**
See **Exemptions; Executors and Administr**
**Pledge.**

**EVICTION.**
See **Pleading.**

**EVIDENCE.**
See **Actions; Bailments; Contracts; Gifts;**
**ance (Life); Judgments; Landlord a**
**Negligence; Negotiable Instruments;**
**Real Property Law; Ships and Shippin**
**ance; Summary Proceedings; Vendor**

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**EXAMINATION BEFORE TRIAL.**
See **Depositions.**

**EXCISE.**
See **Liquor Tax Law.**

**EXEMPTIONS.**
*When widow not estopped from claiming her statutory right — Husband and wife — Dower — Code Civ. Pro.* § 2670.— Where in 1889, about a year after their marriage, the wife of decedent, who died in 1920, executed a release of her dower and other rights which she had or might have in and to his property, and it appears that no children were born of the marriage; that since the execution of the contract the parties had lived separate and apart, and that the wife had never demanded or received any support or maintenance from him, it must be held, under section 2670 of the Code of Civil Procedure, that he died having a family, and that the wife was not estopped from claiming her statutory right to have certain property set apart to her as widow. Matter of Shulenburg, 155.
See **Tax Law; Transfer Tax.**

**EXECUTIONS.**
See **Sheriffs.**

**EXPRESS COMPANIES.**
See **Depositions.**

**EXECUTORS AND ADMINISTRATORS.**
1. *When application for letters of administration granted — Statutes — Preference — Code Civ. Pro.* §§ 2564, 2565, 2588(2).— A surrogate has no discretion to exclude a person declared by statute to be entitled to priority of appointment as administrator, except in cases where his disqualification is declared by the statute itself. After the death of a wife intestate, her surviving husband died leaving a will by which he gave one-third of his estate to a son, one-third to a daughter, who favored the appointment of the son as administrator of the mother's estate, one-sixth to a daughter who favored the appointment of another daughter who was given one-sixth of the estate for life, with remainder to the son. The father's will is being contested by the daughter who petitions for letters of administration, and the daughter who favors such appointment. *Held,* that facts alleged against the son, who opposed the appointment of his sister as administratrix, not being such as are set forth in either section 2564 or 2565 of the Code of Civil Procedure as constituting disqualification to receive letters of administration or as conditions warranting a refusal to grant them to him, his application therefor will be granted and the application of the daughter denied, as, though both had an equal right of administration, under section 2588(2) men must be preferred to women. Matter of McOwen, 151.

2. *When order will be made directing executor to convey real estate pursuant to contract — Wills — Estoppel — Code Civ. Pro.* § 2697.— Where by a deed of conveyance of a farm, containing a reservation to the grantor of the house and lot, a part of the farm,

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**EXECUTORS AND ADMINISTRATORS** — Continued.
it was covenanted and agreed that the grantee, after the death of his grantor or whenever she was ready to sell, should have the option of buying the house and lot, an order may be granted under section 2697 of the Code of Civil Procedure, directing the executor of the grantor to execute and deliver to said grantee a deed of the house and lot. The fact that said grantee when the will was read, by which his grantor devised the house and lot subject to the option given to him, stated that he did not desire the house and lot mentioned, did not estop him from claiming his rights under his contract with the testatrix. Matter of Miller, 283.

3. *Contested probate — When executor will not be appointed temporary administrator — Incompetent persons — Code Civ. Pro.* § 2596.— Where the son, who is an epileptic, an inmate of a state hospital and the only heir of testatrix, joins in an application of his special guardians for the appointment of a temporary administrator under section 2596 of the Code of Civil Procedure, pending the son's contested probate of the will before a jury, which cannot be tried for some time, the application may be granted as matter of discretion. Upon the facts and the law applicable thereto it would be an unwise exercise of discretion to appoint one of the executors as such temporary administrator, even though he is a prominent and responsible man of business, and though such a course will cause the payment of an extra commission, a disinterested and suitable person, an attorney and counselor at law, will be appointed such administrator. Matter of Burnham, 455.

4. *Alien enemies — Trading with the Enemy Act*, § 7.— A proceeding under section 7 of the Trading with the Enemy Act, on behalf of an alleged widow who is a resident citizen of Germany, to revoke letters of administration granted upon the estate of her alleged husband, cannot be further prosecuted until peace is formally declared. Matter of Kuntzsch, 694.

See **Accounting; Gifts; Parent and Child; Surrogates' Courts.**

**FORECLOSURE.**
*Mortgages — Default — When deficiency judgment may not be entered for taxes and assessments.*— Though the defendant in an action to foreclose a mortgage who made the bond allows a default to be taken against him, no judgment for deficiency may be entered against him for taxes and assessments paid by plaintiff after the action was commenced. Owen v. Bodine, 142.

See **Mechanics' Liens; Mortgages; Pleading.**

**FOREIGN CORPORATIONS.**
See **Transfer Tax.**

**FRAUD.**
See **Contracts; Partnership.**

**GENERAL BUSINESS LAW.**
§§ 341, 345 — *Witnesses testifying before legislative committee not entitled to immunity from prosecution under said statute.*— The "Lockwood committee" is not a "court, magistrate or referee" within the meaning of section 345 of the General Business Law.

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Where because of testimony given by them as witnesses before the joint committee of the senate and assembly (Lockwood committee), as to their dealings with each other and with others, defendants were charged by indictment with a violation of section 341 of the General Business Law, they are not entitled to the immunity from prosecution granted by section 345 of said statute. **People v.** Bryant Co., 133.

§ 91, Childs Co., Inc. v. P. Reardon Inc., 178.

**GENERAL CORPORATION LAW.**

§ 16, Taplinger & Co. v. Ward & Co., 115.

**GENERAL RULES OF PRACTICE.**

Rule 6, Buckley v. Sharpe, 206.

**GIFT OVER.**

See **Wills.**

**GIFTS.**

*Causa mortis — Accounting — Executors and administrators — Jurisdiction — Surrogate's Court — Evidence — Code Civ. Pro.* § 2679.— Objection having been made to the accounts of an administrator for failure to account for the proceeds of a judgment assigned by the decedent and satisfied of record, a motion to dismiss the objection, on the ground that the Surrogate's Court has no jurisdiction to determine the issues involved, will be denied under section 2679 of the Code of Civil Procedure. Where, with the exception of delivery, all the other elements of a gift *causa mortis* of household furniture, of which decedent had no right of possession until the termination of the lease of an apartment which he had sublet, were amply proved and conceded, and it appears that he had given the donee the keys of the apartment before the gift was formally evidenced by a writing, it will be held that there was a valid gift *causa mortis*. Matter of Goodwin, 39.

See **Deeds.**

**GOODS, SOLD AND DELIVERED.**

See **Sales.**

**GREATER NEW YORK CHARTER.**

§§ 149, 419, People ex rel. Mullen Cont. Co., Inc., v. Craig, 216.

**GUARDIANS.**

*Who may be appointed — Infants — Wills — Code Civ. Pro.* § 2649.— Upon an application for the appointment of a guardian of the person and estate of an infant, the fundamental and paramount consideration must be the welfare and best interests of the infant. Where it is made to appear that the welfare and interests of the infant will be best served by the appointment of some one other than the petitioner, though not a relative, all other considerations must give way. Where it appears that the interests of an infant between the ages of thirteen and fourteen years will be best served by the appointment of either his maternal grandmother or a paternal aunt, and the infant expresses a preference for his grandmother, she will be appointed guardian of his person and under

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**GUARDIANS** — Continued.
section 2649 of the Code of Civil Procedure the executor and trustee under the will of the father of the infant may be appointed guardian of the infant's estate. Matter of McGuire, 81.

**HIGHWAYS.**

1. *Immunity of state.— When state not negligent in care of highways — Claims — Highway Law,* § 176.— The state is always immune from actions or liability unless it expressly waives such immunity and assumes liability. By section 176 of the Highway Law (Laws of 1909, chap. 30, as amended) the state assumes liability for defects in its highways where the state highway is under the patrol system. It is not negligence on the part of the state to place gravel upon the dirt part of a state highway, worn away from time to time, and bring it up to the level of the macadam surface part of the road. While claimant's intestate, a boy about seven years of age, was riding as a passenger on an auto bus which was being driven along a state highway operated under the patrol system, the steering gear of the bus broke and the driver could neither guide nor control it. He applied both the front and emergency brakes but the momentum carried the bus along for some distance, and while so moving the left front wheel ran on the hard surface of the macadam road and the right wheel ran on the loose gravel part of the road, thus deflecting the course of the bus toward the north edge of the road. When the bus got to the edge of the road it had almost stopped, but still had momentum sufficient to bring the right front wheel over the edge of the road when the bus overturned, dropped to the bottom of the embankment in the field adjoining and in going down it struck the top of the retaining wall and tore some of it out. Claimant's intestate was caught between the top of the seat in the bus and the bottom of the embankment and was so injured that within a short time he died. Just before the accident the state had placed on each side of the macadam part of the road at the place of the accident several inches in thickness of loose gravel and had brought the sides up to a level with the macadam part of the road and left the dirt and gravel to become hard and packed by the use of the public, but at the time of the accident the gravel had not become hard or packed. *Held,* that the conditions as they existed at the time of the accident were not "defects" within the meaning of section 176 of the Highway Law and the claim herein will be dismissed on the ground that the state was not negligent in failing to anticipate the emergency that occurred at the time of the accident. Best v. State of New York, 272.

2. *Injury sustained by fall on privately constructed sidepath — State not liable.*— Claimant, while walking on a sidepath along a public highway constructed by the state and maintained under the patrol system, caught her foot on a flagstone covering a sluiceway under the sidepath which had been constructed many years ago by residents in the vicinity for their own convenience and used quite extensively by pedestrians, and as a result she fell and broke her arm. *Held,* that the state was not liable and a claim for damages will be dismissed. Kibner v. State of New York, 444.

**HIGHWAY LAW.**
§ 176, Best v. State of New York, 272.



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**HUSBAND AND WIFE.**

1. *When payment under separation agreement released by divorce.* — Upon entry of the final decree in a wife's action for divorce, the defendant's legal obligation to support her comes to an end and he is released from the payment of any sum due under a separation agreement which did not in terms provide as to the length of time the weekly payments thereunder should continue. However, the defendant is liable for any payment falling due prior to the entry of the final decree, and plaintiff is entitled to judgment for the amount thereof. Boate v. Boate, 321.

2. Action for separation — Dismissal of complaint on merits — Judgment may not be amended so as to provide for education and maintenance of children — Code Civ. Pro. § 1771 — Remedy is under Domestic Relations Law, § 70. Lesser v. Lesser, 701.

See **Adoption; Wills.**

**INCOMPETENT PERSONS.**

See **Executors and Administrators; Lunatics.**

**INDICTMENTS.**

*When motion to dismiss granted — What constitutes a criminal conspiracy — Landlord and tenant — Evidence — Criminal law — Penal Law*, § 580(5).— To constitute a criminal conspiracy it must appear either that the parties charged therewith agreed to commit a crime or that they agreed to employ criminal means to accomplish a lawful end. Section 580(5) of the Penal Law does not apply to real estate. A landlord who, before the expiration of the lease and in violation thereof, by means which violate no then existing statute, reenters the premises in the absence of the tenant, to make repairs, is a mere trespasser and commits no crime by such act. Where on motion to dismiss an indictment charging a landlord and the superintendent of an apartment house in the city of New York with conspiracy under section 580(5) of the Penal Law it appears that the defendants, in entering the apartment of one of the tenants in his absence for the purpose of making repairs, were not guilty of an unlawful or forcible entry, the motion will be granted on the ground that there was no legal evidence to sustain the indictment. It is not every violation of a legal right that constitutes a crime, and if the tenant sustained damage by reason of the act of defendants, his remedy is by a civil action. People v. Zittel, 33.

**INFANTS.**

See **Guardians; Parent and Child.**

**INJUNCTIONS.**

1. *When motion to vacate a temporary injunction granted — Labor unions — Meaning of word "picketing" — Damages.*— Employees on strike may employ persuasion and peaceable means to keep non-union men from taking their places, and the fact that the employer is irreparably damaged as an incident of picketing by the strikers and that it has no adequate remedy at law does not deprive the strikers of their legal right to "picket," providing there is no malice and no violence A motion to vacate a temporary injunction principally against "picketing" granted in an action brought for a permanent injunction against certain workmen of

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**INJUNCTIONS** — Continued.
the plaintiff, out on strike, granted, with admonition to defendants that any excesses or violence or depredations or destruction of property will result in another injunction, *instanter*. Wood Mowing & Reaping Machine Co. v. Toohey, 185.

2. *When plaintiff will be granted a mandatory injunction — Contracts — Animals — Receivers.*— Where by a written agreement of sale defendant was to have possession and use of a valuable stallion, in California, during the seasons of 1919 and 1920, the plaintiff to have him for use in Kentucky during the seasons of 1921 and 1922, and "thereafter on new arrangements mutually satisfactory," the defendant has no legal right to insist upon any condition for the return of the horse to plaintiff except to ship him to plaintiff's stock farm in Kentucky, the season of 1921 now opening. Where defendant flatly refuses to abide by the agreement unless plaintiff enters into a new agreement which is unsatisfactory to him, the plaintiff will be granted a mandatory injunction requiring defendant to ship the horse in accordance with their agreement, and enjoining other disposition of him. Upon giving a bond a receiver of the stallion will be appointed with power to take appropriate steps, in California or elsewhere, and to invoke the aid of any court to gain possession of the horse, and ship him to plaintiff's stock farm, to which place he should have been sent in August or September, 1920. Madden v. Rosseter, 416.

3. *Summary appropriation by the state of disputed land, under Laws of* 1911, *chap.* 746, *for canal uses, is a complete answer to a motion to continue an injunction.*— The rule that a public body may not institute proceedings under the Condemnation Law to condemn property which it claims to own, is not operative as against the state in its appropriation of lands for canal terminal uses. Several notices sent by the state superintendent of public works to plaintiff directing him to remove that part of a building which he claims to own, but which the state claimed encroached upon canal lands, was followed by a letter of advice to the effect that in the case of plaintiff's refusal or failure to make such removal, the department of public works would cause the same to be demolished and removed at plaintiff's expense. *Held*, that the summary appropriation by the state of the portion of land in controversy, made pursuant to statute (Laws of 1911, chap. 746) for Barge canal terminal uses, was a complete answer to a motion to continue an injunction theretofore procured by plaintiff in an action brought to restrain the defendant individually and as superintendent of public works from entering upon the premises until the further order of the court. Plaintiff's reliance upon the Statute of Limitations to buttress his claim, if his title should otherwise fail, does not change the situation, and he runs no hazard of being unjustly deprived of any advantage attaching to his claim of ownership to the land in dispute, and his rights are securely safeguarded against infringement without the protection of an injunction. Miller v. Walsh, 430.

4. *Dramatic compositions — When licensee does not acquire motion picture rights — Injunction pendente lite denied as to use of name.*— Under a grant by the author of a dramatic composition of the right to translate and adapt it into the English language and to perform

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**INJUNCTIONS** — Continued.
or cause to be performed in said language, the licensee does not acquire the motion picture rights to the play. Where subsequent to such a grant the author of the play transferred the motion picture rights therein to another, the licensee of the right of translation and spoken performance is not entitled, upon the theory of unfair competition, to an injunction *pendente lite* to restrain, in connection with any motion picture production of the play, the use of the title "The Passion Flower" which plaintiff devised for the spoken drama and of lines, captions and titles in the English language in connection with any such production. Underhill v. Schenck, 520.

5. *When motion to continue injunction pendente lite granted — Labor unions — Picketing — Restaurant keepers.*— Plaintiff, engaged in the restaurant business and employing approximately a hundred persons in different capacities, has always maintained an "open shop" and has never discriminated against union labor. While its restaurant about ten P. M. was crowded with patrons, who though they had given their orders had not been served, all the waiters without cause or grievance suddenly, without warning or notice, walked out, and on the following day began picketing in front of plaintiff's place of business in squads of from two to fifteen persons, each carrying a sign which read "Workers of Pie' Catelan on strike for better conditions." It appeared by affidavits that as part of a scheme to injure and demoralize plaintiff's business and to produce fear on the part of its employees, some of them were subjected to aggravated assaults and threatened that if they did not cease working for plaintiff and join the union harm would follow; that there were threats of injury to patrons; that in order to protect its employees from harm plaintiff was put to the necessity of carrying them to and from work in taxicabs. It also appeared that agents of defendant, the International Federation of Workers in the hotel, restaurant, etc., industry, had entered plaintiff's premises, blocking the entrance thereto, and had used indecent language to its employees, interfered with them in the discharge of their duties, and followed them to their homes. *Held,* that a motion to continue an injunction *pendente lite* will be granted. Pre' Catelan, Inc., v. International Federation of Workers, 662.

6. *When will be granted — Labor unions — Evidence — Ships and shipping — Conspiracy — United States Shipping Act* (39 U. S. *Stat. at Large,* 728), §§ 14, 16 — *United States Criminal Code,* § 37. — In an action by a large exporter of lumber at New York to restrain a course of conduct which, if persisted in, would inevitably bring financial ruin upon the plaintiff, some of the defendants, representatives of a labor union, openly stated that there was an avowed purpose on its part to force plaintiff to unionize its plant. This plan could not effectually be carried out without the cooperation of such of the defendants as were the owners or agents of steamship companies which under section 14 of the United States Shipping Act (39 U. S. Stat. at Large, 728), are required to serve the public without discrimination. While there was no proof of an agreement between the representatives of the steamship companies and the union to refuse plaintiff's product, there was sufficient evidence of their approval of, connivance at and sanctioning of the acts of the employees as to amount to an overt act on the part

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**INJUNCTIONS** — Continued.
of the steamship companies. *Held,* that the various acts of the defendants alleged in the complaint amounted in law to a conspiracy. The concerted action of the representatives of the steamship companies, who evinced no desire to receive or handle plaintiff's lumber, and their employees, none of whom did they discharge or reprimand for discriminating against plaintiff, but openly sanctioned such conduct, leads to the accomplishment of an unlawful act; *i. e.*, that of violating both the United States Shipping Act and section 37 of the United States Criminal Code. It being apparent that plaintiff will suffer irreparable damage, for which it has no proper or adequate remedy at law, an injunction broad enough to include agents, stevedores, receiving clerks, etc., will be granted against all of the defendants under section 16 of said Shipping Act. Burgess Bros. Co., Inc. v. Stewart, 673.

See **Banks and Banking; Labor Unions; Mandamus; Membership Associations; Picketing.**

**INSURANCE (LIFE).**
*When company bound by delivery of policy to assured although conditions of policy are not complied with — Actions — Evidence — Contracts.*— The common practice of insurance companies placing in the hands of agents policies which appear on their face to be binding contracts of insurance, but which are intended to be effective only on compliance with certain preliminary conditions, is not to be commended, and if the agent deliver the policy without requiring compliance with such conditions, the insurance company is in justice bound by the policy. Where in an action to recover on a policy of insurance issued by defendant on the life of plaintiff's husband within a month of his death, the evidence is that the delivery of the policy by defendant's soliciting agent to the insured, who never signed the application for the policy, and his acceptance thereof, were with intent that it should at once become a contract and the first premium paid later, and it further appears that the attention of the insured, though he had previously taken out other insurance with defendant, was not called to any provision of the policy requiring the signing of an application, or the payment of the first premium, or any other preliminaries, and that the agent had apparent authority to deliver the policy, it became a contract binding upon both parties, and as against the defense that the policy had no valid inception, plaintiff was entitled to recover the amount of the policy less the amount of the first premium, with interest from the date when the proceeds became due and payable. Isaacs v. Equitable Life Assur. Society, 468.

See **Transfer Tax.**

**INTERSTATE COMMERCE.**
See **Contracts.**

**JOINT TORT FEASORS.**
See **Judgments.**

**JUDGMENTS.**
1. *Joint tort feasors — When payment of judgment by attorney not a satisfaction — Assignments — Evidence.*— It is only when one of several joint tort feasor judgment debtors pays the judgment that it is satisfied as to all. The mere fact that the attorney for one of

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**JUDGMENTS** — Continued.
the judgment debtors, without the knowledge of his client, pays the amount of the judgment to the judgment creditor and takes an assignment thereof to a third person, is no proof that the intention was to satisfy the judgment. Nor is the fact that the assignment was made for the purpose of collecting the judgment from the other joint judgment debtor proof that the payment was made in satisfaction of the judgment. A stranger may purchase a judgment without notice to any party to it and thus acquire all the rights of the judgment creditor. The authority of the attorney of an unsuccessful defendant ceases with the entry of judgment against him. While the property of one of two joint tort feasor judgment debtors was under a levy made under an execution issued on the judgment, one who had been his attorney in the action, without the knowledge of either of the judgment debtors, voluntarily paid the judgment from his own money, took an assignment of the judgment to his stenographer, and after the execution had been withdrawn and the levy released, he issued a new execution on the judgment against the property of the other judgment debtor. *Held*, that such payment was not a satisfaction of the judgment. In the absence of proof that the attorney acted for his former client or even sustained the relation to him of attorney at the time of making payment, the proof being that his former client made no request that the judgment be paid, there was no presumption that said attorney acted in the matter as attorney for his former client, and the complaint in an action by the other judgment debtor, to restrain the collection of the judgment, will be dismissed. International R. Co. v. Pickarski, 349.

2. *Proceedings for sale of infants' real estate — Title — Specific performance — Code Civ. Pro.*, §§ 1646, 1679.— The complaint in an action brought against infants under section 1638 *et seq.* of the Code of Civil Procedure to compel a determination of their adverse claims to plaintiffs' title to certain real property set forth a proceeding for the sale of defendants' interest in the property, alleged that a sale thereof by their mother, as special guardian, was in good faith and for full consideration, and that reconveyance of the property to her individually, who conveyed to plaintiffs, was made in good faith "and for the interest and welfare of the defendants." Judgment was entered in favor of plaintiffs forever barring the defendants from all claims to any estate, right, title or interest in and to the property. The vendee named in a contract for the sale of the property objected to the title as unmarketable on the ground that a finding of the court that the sale of the property to the mother was made "in good faith and for the interest and welfare of defendants" impressed some kind of a trust upon the property for the benefit of the infants. *Held*, that the answer to such contention was, that reading the quoted words in connection with the findings and judgment as a whole, which negatived any declaration of trust in favor of the infants, they meant simply that the infants' proceeding in its entirety, including the sale and disposition of the infants' interest in the property, was for their interest and welfare. The findings of the court in the other action, that the special guardian "duly" sold the defendants' interest and that such sale, which was directly approved in the infants' proceed-

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**JUDGMENTS** — Continued.
ing, was made "in good faith and for a valuable and full consideration" was binding on the court in the present action and was an answer to a contention that any deed to the mother, as purchaser, was void under section 1679 of the Code of Civil Procedure, and that her deed to plaintiffs conveyed nothing. Section 1646 of the Code of Civil Procedure does not confer upon infants an absolute right to a new trial, and a contention that such a right was sufficient of itself to render the title unmarketable, is untenable, and in a vendor's action to compel specific performance of a contract for the sale of the property the plaintiffs are entitled to judgment. Kussold v. Behrman, 682.

See **New Trial.**

**JUDICIAL DISCRETION.**
See **Trial.**

**JURISDICTION.**
See **Court of Claims; Ships and Shipping.**

**JURY.**
See **Trial.**

**LABOR DISPUTES.**
See **Membership Corporations.**

**LABOR UNIONS.**
See **Injunctions; Picketing.**

**LAND CONTRACTS.**
See **Specific Performance.**

**LANDLORD AND TENANT.**
1. *Action by corporation landlord for rent of an apartment in the city of New York — Motion to change place of trial from county of plaintiff's residence to New York county granted as matter of right — Motion to change venue for convenience of witnesses not waived by former motion.*— Justice is not promoted by permitting a landlord, incorporated to own and rent a building in the city of New York, to bring an action for a small amount of rent in a county wherein it claims a residence remote from the county where the leasing was made, and in which all persons interested and their necessary witnesses have their actual residence and may easily resort to the courts. Where in an action brought by such a landlord to recover rent for an apartment in the city of New York for the months of October and November, 1920, under a written lease entered into on September 20, 1920, the answer pleads the defenses permitted by chapter 944 of the Laws of 1920 which went into effect September 27, 1920, and it is plainly apparent that the venue, as laid, was to vex the defendant and make difficult her opportunity for defense, her motion to change the place of trial to the county of New York will be granted as a matter of right. Northway Holding Co., Inc., v. Parker, 57.

2. *Summary proceedings — Objectionable tenant — When dismissal of petition is error — No appeal unless a final order is entered.* — Upon the trial of a summary proceeding instituted October 6, 1920, against a holdover tenant of an apartment, alleged to be

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objectionable, the landlords produced as witnesses several occupants of apartments in the same and adjoining house, who testified to conduct on the part of defendant sufficient to sustain the specifications in the petition of the alleged objectionable nature of his occupancy, but none of them could testify, as alleged in the petition, that any refuse was thrown from the windows of the tenant's apartment or that any piano therein was unreasonably used after June, 1920. *Held*, that the dismissal of the petition upon the ground that under the statute (Laws of 1920, chap. 942) the proceeding could be maintained only if the tenant was doing objectionable things at the time the proceeding was instituted, was error, for the reason that the trial judge had no right to take the case from the jury because of the absence of evidence that the objectionable acts had continued over the summer. Where no final order has been entered in a summary proceeding, an appeal from a dismissal of the landlord's petition must be dismissed. Klingenbeck v. Young, 121.

3. *When action for use and occupation maintainable — Lease — Election — Laws of* 1920, *chap.* 944, §§ 5, 6.— Where premises in the city of New York were leased for dwelling purposes for one year ending September 30, 1920, an action to recover the reasonable value of the use and occupation of the premises for the months of October and November, 1920, during all of which time the defendant was in possession, is an election on the part of the plaintiff to regard the defendant as a tenant and not as a trespasser, and such election is conclusive upon both parties. Under the provisions of sections 5 and 6 of chapter 944 of the Laws of 1920, by which the legislature intended to confer upon the owner of residence property, such as here, a right of action to secure a fair and reasonable rent, an action to recover for use and occupation is maintainable and the plaintiff is not necessarily limited to a recovery of the same rent as was reserved in the lease, which has expired. 17 & 19 East 95th St., Inc. v. Bernstein, 513.

See **Counterclaim; Eviction; Indictments; Lease; Statutes; Summary Proceedings; Venue.**

**LEASE.**

1. *Construction of — Personal covenants — Landlord and tenant — Cancellation clause — Summary proceedings — Evidence.*— If there is any doubt or uncertainty as to the meaning of a lease, it will be construed in favor of the tenant. A lease not in terms providing that the conditions and covenants thereof should bind the legal representatives, heirs and assigns of the parties, contained the following: "Said landlord reserves the right to terminate this lease and the term thereof at any time after May 1, 1920, in case of a *bona fide* sale of the property upon giving 90 days' notice in writing to said tenant, addressed to said demised premises, of his intention to so terminate the same, and this lease and the term thereof shall cease, determine and end at the expiration of 90 days from the day when such notce is given." *Held*, that the covenant contained in said clause did not run with the land but was purely personal to the landlord and he having died without having exercised the privilege to terminate the lease, it could not be exercised by any

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**LEASE** — Continued.
subsequent grantee of the premises. The present landlord in a summary proceeding against the tenant as a holdover after service upon him of the ninety days' notice called for by the lease, having failed to establish that the conveyance of the premises to said landlord by the grantee of the executors of the original landlord, was a *bona fide* sale which would entitle the petitioner to any rights under the cancellation clause, even if it were held that the covenant was one running with the land, the tenant is entitled to a final order dismissing the proceeding upon the merits. The deposition of the agent of the landlord, who as broker negotiated the lease with the tenant, was inadmisible in evidence, the provision of the lease not being ambiguous. 507 Madison Ave. Realty Co., Inc., v. Martin, 315.

2. *Exercise of option to renew — Notice — Landlord and tenant — Summary proceedings — Evidence.*— By a lease expiring April 30, 1920, the tenant had the option of a renewal for three years upon giving notice to the landlord by registered mail between April 1 and November 1, 1919. During that time the tenant gave both oral and written notice to the general agent of the landlord having charge of the premises and collection of rents, that he exercised his option to renew. *Held,* that where the testimony of the tenant in a summary proceeding against him as a holdover brought by one who became the owner of the premises during the continuance of the lease, was to the effect that when he gave the oral and written notice he was told by the agent that notice by registered mail was not necessary, was denied by the agent, a question of fact was presented and a final order in favor of the landlord entered by direction of the court after a jury trial will be reversed and a new trial ordered. Northmann v. Haas, 384.

3. *When provisions of old lease not incorporated in renewal lease — Landlord and tenant — Summary proceedings.*— Where the provisions of an old lease are continued in a new lease by reference only, a provision of the former lease for a renewal of the term is not incorporated in the new lease, unless that intention is clearly expressed. Where the right to a renewal of a five-year lease has been lost by failure to give the proper notice for an extension of the term, and the assignee of all the tenant's rights, without objection on the part of the landlord, continues in possession of the premises for one month beyond the term, a new lease given to him for five years from the expiration of the old lease, containing no specific provision for a renewal, is only a lease for a term of five years, even though the provisions of the old lease by reference are incorporated in the new one, which declares that it was intended as a renewal of the old lease. Where in summary proceedings instituted against the assignee of the lease as a holdover, his only claim is that by the terms of the new lease he was entitled to at least a further term of two years, the landlord will be granted a final order awarding him possession of the premises. Jones v. Cocomitros, 447.

See **Pleading; Summary Proceedings.**

**LEGACY.**
See **Wills.**

**LICENSES.**
See **Injunction; Mandamus.**

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**LIFE ESTATES.**

See **Transfer Tax; Wills.**

**LIQUOR TAX LAW.**

§ 7, *as amended in* 1918 — *Powers of state commissioner of excise — When claim for salary dismissed — Statutes — State Finance Law*, § 35.— Under section 7 of the Liquor Tax Law, as amended in 1918, the state commissioner of excise has power to appoint special agents at an annual salary, but as the statute fixes no term of office, the commissioner of excise may in his discretion discharge or remove a special agent at any time. Where the state commissioner of excise, as in duty bound by section 35 of the State Finance Law, notifies a special agent appointed by him under section 7 of the Liquor Tax Law, that the legislature has made no appropriation for special agents, beyond March 31, 1920, such action of the commissionr is a notification to the special agent, who was serving in continuance of a probationary appointment made in 1915, that his services would be no longer required, and his claim for salary for the month of April, 1920, must be dismissed. Heinemann v. State of New York, 265.

**LUNATICS.**

See **Actions.**

**MANDAMUS.**

1. *When denied against comptroller of the city of New York — Contracts — Municipal corporations — Fraud — Greater New York Charter*, §§ 149, 419.— Mandamus lies against public officers to compel the performance of ministerial duties which are clearly absolute and imperative. Where although the various engineers and auditors whose duty it is, as a condition precedent to the issuance of a warrant of the city of New York on account of work done pursuant to a municipal contract involving an expenditure of more than $1,000, to examine into the matter, have certified that work of the character and quantity entitling a contractor to receive a progress payment in a certain sum, has been done, the city comptroller may delay payment pending an examination by him under section 149 of the Greater New York Charter of the contractor under oath with respect to facts and circumstances surrounding the public letting of the contract, in order to determine whether it was of the character provided in section 419 of the Greater New York Charter, and whether there was collusion in the bidding or fraud in the performance of the contract. Where the contractor refuses to fully submit to such an examination, his application for a writ of peremptory mandamus to compel the issuance of the warrant will be denied as matter of discretion. The exception in said section 149 of the Greater New York Charter refers to "claims arising under the provisions of contracts made at public letting in the manner provided by section 419 of this act" was intended only to prevent an inquiry into the manner in which a contract validly entered into by the city has been performed, and not to one where the circumstances indicate that the contract originated in fraud; the exception, therefore, is not controlling in the present case. People ex rel. Mullen Contracting Co., Inc., v. Craig, 216.

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**MANDAMUS** — Continued.

2. *When motion for writ of, denied — County clerk of Seneca county — Jurors.*— A writ of mandamus commanding the county clerk of Senaca county to recognize as proper jurors those whose names were drawn from the north district jury boxes, to cancel the list drawn from the combined ballots, and to keep in separate boxes the ballots bearing the names of grand jurors and of trial jurors for the north and south districts, respectively, will be denied. Matter of Seeley, 633.

3. *Who entitled to a peremptory writ of — Licenses — Taxicabs — Trade marks — Injunctions — Code of Ordinances of city of New York, art. 8, chap. 14.*— While mandamus will not lie to compel a public officer to exercise a discretionary power, yet if his action in a given matter is in a legal sense arbitrary, tyrannical or unreasonable, or is based upon false information, the relator may have a remedy to right the wrong which he has suffered. The provisions of article 8, chapter 14, of the Code of Ordinances of the city of New York not only indicate with accuracy the function of the commissioner of the department of licenses in regard to the issuance of licenses to operate taxicabs as public hacks for hire, but also suggest the reasonable limitations thereon to be the ascertainment of the safety and fitness of cab and driver. Whether vehicles infringe upon patents or trade marks or involve possibilities of unfair competition with other instrumentalities of transportation is entirely outside of the purview of the commissioners's duties. To a petition for a writ of mandamus to compel the commissioner of the department of licenses of the city of New York to issue to relators licenses to operate their taxicabs as public hacks for hire, he made a return that having learned that the courts had established for the "Twentieth Century Brown & White Taxicab Association, Inc., the right to use the colors brown and white in a particular combination and scheme, he had, in view of the facts and adjudications, and actuated solely by a sense of public duty, refused to issue licenses to others operating brown and white taxicabs, in the interest of and to conserve the public welfare, and to protect the public against the deception arising out of such simulation. *Held,* that it being quite apparent that the adjudications in the actions which terminated in injunctions in favor of the said association, did not establish its right to the combination of brown and white colors, except against the particular defendants in those suits, the statements in the return to the petition for the writ indicated a radical misconception of the significance of said adjudications. The decision of said commissioner refusing to grant taxicab licenses to relators was based solely on the adjudications in favor of the Brown & White Association. There was no pretense that the public is otherwise injured by the competition of relators and the various affidavits indicated that the brown and white color is understood by the public to mean that cabs so painted charge a lower rate than ordinary cabs. *Held,* that the relators who charge such lower rates were entitled to a peremptory writ as applied for. People ex rel. Hultman v. Gilchrist, 651.

**MARRIAGE.**

See **Actions; Contracts.**

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**MASTER AND SERVANT.**
See **Negligence.**

**MECHANICS' LIEN.**
*Foreclosure — Motions for leave to serve supplemental answer and to intervene denied.*— The final judgment in an action to foreclose a mechanics' lien, from which no appeal was taken, directed that the amount of the liens of the several defendant lienors be first paid, then the amount of plaintiffs' lien, the surplus, if any, to be paid into court. After the entry of said judgment the directors of the defendant owner, upon the affirmance of a judgment recovered against them on their written guaranty that a first mortgage upon the premises would be procured and a portion of the net proceeds paid to the contractor, paid the judgment. *Held,* that a motion by the defendant owner for leave to serve a supplemental answer and a motion by said directors for leave to intervene, both motions being predicated upon the fact of the payment of such judgment, will be denied. The defendant lienors, whose rights in the real property, as finally adjudicated in the lien action, are superior to those of the others, have no concern with the differences among the others, except that they be no longer delayed in securing the fruits of their litigation. Van Etten v. Sphinx Holding Corp., 436.

**MEMBERSHIP ASSOCIATIONS.**
*Action against — Code Civ. Pro.* §§ 1919, 1923 — *Sufficiency of complaint — Injunction pendente lite granted — Labor dispute.*— By section 1919 of the Code of Civil Procedure a simple method is provided by permitting an action to be maintained against either the president or treasurer of an unincorporated membership association, to bring the entire membership before the court, and if that simple mode is not preferred, section 1923 of the Code of Civil Procedure preserves the common law right of suing all the members. While the practice of suing one member, both individually and as president, and another member individually and as assistant general secretary, cannot be sanctioned, the complaint will not be condemned if in fact a cause of action was alleged against the president. Where the complaint, in an action brought against the president and assistant general secretary of the "Amalgamated Clothing Workers of America," an unincorporated membership association having an approximate membership of 175,000 workers in the clothing trades, alleges that the defendants combined to do the injurious acts arising out of labor troubles of which plaintiff, a clothing manufacturer, complains, such allegations mean and charge all the members and they are all liable. The complaint and affidavits on motion for an injunction *pendente lite* considered and defendant's motion for judgment on the pleadings denied and the injunction granted. Skolny v. Hillman, 571.

**MERGER.**
See **Wills.**

**MORTGAGES.**
*Recovery of money paid for agreement extending mortgage, which agreement defendant failed to execute — Failure of consideration — Equity — When findings in foreclosure action not res adjudicata.*— One who had acquired the title to property at the sale on foreclosure of his own mortgage was told that he could have an extension for

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**MORTGAGES** — Continued.
two years of the first mortgage upon the property, held by defendant and almost due, by a payment of $3,000 on the principal, interest and other charges, and in order to avoid personal liability he transferred the title to plaintiff who alone signed the extension agreement. The $3,000 was paid to defendant by plaintiff from funds furnished by his grantor but no part was ever returned by defendant, and it never executed the extension agreement. In an action to foreclose the first mortgage for its full amount, less the $3,000, the only issue litigated was whether there had been an extension, whether the mortgage was due when the action was begun. That issue was decided in favor of the plaintiff in the foreclosure action and it became the purchaser of the property at the sale. *Held,* that in an action to recover the $3,000, which had been applied by defendant on its mortgage, on the ground that the consideration had failed, the findings in the foreclosure action with reference to the payment of the $3,000 related to matters not litigated, and were not *res adjudicata* in the present action. The foreclosure action was not commenced until the two years had been nearly completed, and the trial and sale did not take place until after the lapse of such period, and in the meantime the plaintiff herein had carried the property. *Held,* that there was no controlling equity in defendant's favor, which has all it could have had if it had not taken the $3,000, and that plaintiff was entitled to recover such amount which had been paid for something he did not get. Mehlhop v. Central Union Trust Co., 464.

See **Foreclosure; Religious Corporations.**

**MOTIONS AND ORDERS.**

*Where defendant's motion for order of restitution denied — Attachment — Foreign corporation.*— Defendant, a foreign corporation, which did not appear in the action, has no property within this state and is not doing business therein, delayed making the motion to vacate the judgment for nearly a year. *Held,* that as in the event of granting defendant's motion for an order of restitution of its property taken by virtue of a warrant of attachment, plaintiff's only relief would be to institute proceedings in the state of defendant's residence, the motion will be denied. Berman, Inc., v. American Fruit Distributing Co., 345.

See **New Trial; Pleading; Process.**

**MUNICIPAL CORPORATIONS.**

See **Mandamus.**

**MUNICIPAL COURT OF CITY OF NEW YORK.**

See **Service.**

**NEGLIGENCE.**

1. *Action for personal injuries— Statutes — Carriers — Corporations — Pleading — Tort.*— An action against a common carrier to recover damages for personal injuries to a passenger is an action *ex delicto* and not *ex contractu.* Where the complaint alleges that while plaintiff was a passenger on defendant's steamer, and without fault on his part, a door was closed on his hand by reason of the negligence of defendant, its agents, servants and employees, to his

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**NEGLIGENCE** — Continued.
personal injury, for which he demanded judgment in a certain sum, the action is in tort. An allegation that defendant, the "Palisades Interstate Park Commission," is a domestic corporation is subject to the modification that the court must take judicial notice of and review the statutes relating to defendant, its organization and purposes, precisely the same as if said statutes had been incorporated in the complaint. The fact that defendant by the statute creating it (Laws of 1900, chap. 170, and amendatory acts) was given express power to sue and be sued, does not subject it to liability to an individual for negligence in the performance of a public duty, and the complaint on demurrer will be dismissed, with leave to plaintiff to plead over on presentation of an affidavit showing facts that will enable him to overcome the defects in his pleading. Dietrich v. Palisades Interstate Park Comm., 425.

2. *Action to recover for loss of a handbag — Master and servant — Evidence — Bailments.*— While the conductor was examining and stamping the tickets of plaintiff, a Pullman passenger, the porter carried into the car plaintiff's luggage, consisting of overcoat, portfolio and handbag, and when not to exceed two minutes later plaintiff went into the car he found only his overcoat and portfolio. In an action against the director-general of railroads, as agent, to recover for the loss of plaintiff's handbag through the alleged negligence of defendant's servant, it appeared that while the examination of plaintiff's tickets was in progress the porter, whom it did not appear was a servant of defendant, came out of the car empty handed and left after being tipped by plaintiff. *Held*, that it could not be assumed that the bag was left in the custody of defendant so as to make it liable as an insurer. There being no basis in the evidence for a finding of negligence on the part of defendant a judgment in favor of plaintiff will be reversed and the complaint dismissed. Sneddon v. Payne, 537.

See **Conversion; Damages; Highways.**

**NEGOTIABLE INSTRUMENTS.**

1. *Promissory notes made payable in France — When loss from depreciation of French money is not an element of damage — Rate of exchange — Evidence.*— Where at the time certain promissory notes given for the purchase price of shares in a French corporation and made payable in France in francs, both of the parties to the notes resided in that country, the plaintiff in an action on the notes is entitled to recover, in dollars, the amount of the notes computed at the rate of exchange existing when the action was begun. It was defendant's duty when sued to pay the amount of the notes in dollars, and he will not be permitted to take advantage of a change in the rate of exchange in his favor by withholding payment. In the absence of proof to the contrary it will be presumed that the law of France is similar to our own, and therefore the loss from depreciation of French money is not an element of damage, the only damages recoverable for non-payment of the notes at maturity being interest Revillon v. Demme, 1.

2. *Lack of authority in officers of a religious corporation to issue notes — Evidence.*— A business act of a religious corporation must be shown to have been duly authorized before any liability therefor

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**NEGOTIABLE INSTRUMENTS** — Continued.
will attach. A promissory note purporting to have been made by a religious corporation organized under the Laws of 1813 can only be authorized at a meeting of five of the nine trustees which the corporation was authorized to elect each year. Proof that such a note was signed by the president, secretary and treasurer of the corporation does not show that it is the note of the corporation without proof that it was made by its authority. The fact that not all of the nine trustees were acting as such when the note was made does not change the requirement that five trustees were necessary to constitute a quorum. The evidence in an action on the note being insufficient to support a finding that it was authorized by the board of trustees, and the record on appeal from a judgment in favor of plaintiff not showing that defendant received the money represented by the note, and that the corporation by its board of trustees never admitted its liability thereon, the judgment appealed from will be reversed and a new trial ordered. Parucki v. Polish National Catholic Church, 6.

3. *Check drawn in Mexico and payable in New York on condition considered to be a Mexican transaction — When defendant entitled to judgment.*— A check written in the Spanish language and payable in dollars in New York city, was made by defendant, a firm of bankers in Mexico, and there delivered to the payee upon the condition in writing that if a draft given to defendant by the payee at the time, was not paid, the check was to be void and of no value. The draft was not paid, and payment of the check was stopped. In an action on the check, which came to plaintiff's assignor by indorsements made in Mexico, defendant pleaded a breach of the condition upon which the check was given, and all the facts showed that the case presented a Mexican transaction as to all parties except the drawee of the check. *Held,* that New York law does not apply and defendant is entitled to judgment. Hennenlotter v. De Orvananos, 333.

4. *Promissory notes and trade acceptances — Corporations — Evidence.*— Where at the commencement of actions on promissory notes and trade acceptances, the corporation maker was in bankruptcy, the individual defendants, who were sought to be held as makers and indorsers, in support of their contention that their initials on the notes were neither intended nor understood by plaintiff to be other than part of the corporation signature, are entitled to show that by a resolution of the corporation adopted long prior to the making of the notes and acceptances in question, it had been determined that no signature of the corporation to any negotiable paper would be honored or paid unless the same was initialed by said individual defendants, and that the banks were so notified and as matter of fact had refused to pay notes made by the corporation to plaintiff because of the lack of such initials, and the exclusion of the evidence was reversible error for which judgments in favor of plaintiff will be reversed and new trials ordered. H. & K. Costume Co., Inc. v. Maison Bernard Importing Co., Inc., 553.

See **Banks and Banking**; **Contracts**; **Pleading.**

**NEWLY DISCOVERED EVIDENCE.**
See **New Trial.**

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**NEW TRIAL.**

*Newly discovered evidence — When motion for a new trial denied — Evidence — Judgments.*— New trials are granted because of newly discovered evidence for the purpose of giving to a party the benefit of evidence of which he was unaware at the time of the pleadings or trial, not for the purpose of permitting a defendant to needlessly drag out a controversy. The essential characteristic of newly discovered evidence is that it was unknown at the time of pleading or trial, and has come to light since. Where the judgment in favor of plaintiff in an action against a municipality has been unanimously affirmed by the Appellate Division and leave to appeal has been denied both by the Appellate Division and the Court of Appeals, the plaintiff should not be put to the trouble and expense of a new trial simply because the defendant was unable to produce evidence, a part of its public records, of which it knew when it put in its answer and had within its control, and a motion for a new trial upon the ground of newly discovered evidence will be denied with costs. Postal Telegraph Cable Co. v. City of Jamestown, 689.

**NON-RESIDENTS.**

See **Transfer Tax.**

**NOTICE.**

See **Lease.**

**PARENT AND CHILD.**

*Father cannot be released by separation agreement with wife from obligation to support his infant child — Executors and administrators — Claim against decedent's estate for support of an infant — Accounting — Code Civ. Pro.* §§ 2680, 2681.— The father of an infant is primarily liable for its maintenance, and even though by the terms of a separation agreement the mother assumes liability for the infant's maintenance, during her life, the obligation of the father continues after the death of the mother until the child becomes of age. A separation agreement in terms released the father from all claims for the support and maintenance of his infant son during the mother's life. At her death the son went to live with his uncle who, after diligent search, was unable to locate the father. The father's will made no provision for the child who is still a minor. The uncle presented to the executor of the father's estate a duly verified proof of claim for the maintenance, education and support of the infant son for the six years next succeeding the death of his mother. No notice was taken of the claim except by reference in the account of the executor, filed nearly a year after the presentation of the claim. Prior to the institution of a proceeding for the judicial settlement of the accounts of the executor, to which the uncle was not made a party nor included as a creditor of the estate, an action to recover the amount of the claim so presented was brought by the uncle on the theory that the debt sued on was based upon a claim or debt against defendant's testator as provided by sections 2680 and 2681 of the Code of Civil Procedure and the separation agreement was pleaded in bar. It appeared that no part of the money given by the father to the mother for the support of herself and child, at the making of the separation agreement, remained unexpended at the death of the mother who did not leave

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**PARENT AND CHILD** — Continued.
sufficient funds to bury her. *Held,* that the separation agreement did not release the father from the payment of plaintiff's claim, was not a bar to the action and that the plaintiff was entitled to judgment for the full amount claimed, with interest from the date of grant of letters testamentary. Michaels v. Flach, 225.

**PAROL EVIDENCE.**
See **Accord and Satisfaction; Evidence.**

**PARTIES.**
*Contracts — Known usages.*— Parties who contract on a subject-matter concerning which known usages prevail, incorporate such usages by implication into their agreement, if nothing is said to the contrary. Carroll v. Harris, 392.
See **Depositions.**

**PARTNERSHIP.**
*Liability of firm for fraud of one partner — Statute of limitations — Code Civ. Pro.* § 382(5).— A firm is liable for the fraud of one partner in the course of the transactions and business of the partnership, even when the other partners had not the slightest connection with, knowledge of or participation in the fraud. Where in an action against a firm with which plaintiff had an account, for the misapplication of plaintiff's money by one of the partners without the knowledge of the other partners, no claim is made that the defendants other than the guilty partner had knowledge of or participated in the fraud, the statute of limitations prescribed by section 382(5) of the Code of Civil Procedure does not apply except in so far as it relates to the claim against the guilty partner; the liability of the other partners ends with the running of the statute from the time of the actual wrong. Model Building & Loan Assn. v. Reeves, 137.

**PARTNERSHIP AGREEMENTS.**
See **Transfer Tax; Wills.**

**PENAL LAW.**
§ 580(5), People v. Zittel, 33.

**PERSONAL PROPERTY LAW.**
§ 15, Matter of Lee, 511.
§ 62, Plymouth Rubber Co. v. Knott, 695.
§§ 100, rule 4(1, 2), 144(1), International Cheese Co. v. Garra, 543.
§§ 145, 145(3), 156, Guaranty Trust Co. v. Meer, 327.

**PICKETING.**
*Right to picket — Strikes — Labor unions — Injunctions.*— The fundamental thought underlying the judicial decisions by which solely the right to picket was created, was and is that the grant of such right was in furtherance, not of a greater liberty to be exercised by employees out on strike, but for their betterment, if such result could be brought about. It was never intended that the laws of the land should yield in the exercise of the right to picket. The



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**PICKETING** — Continued.
right to picket, even in an orderly and quiet manner, does not carry with it the privilege of destruction as a means to an end; nor does it, even inferentially, confer the right to unlawfully coerce or oppress. Picketing unaccompanied by threats and intimidation is a useless weapon; its effectiveness and its very essence is in the terror it incites. Pre' Catelan, Inc., v. International Federation of Workers, 662.

See **Injunction.**

**PLEADING.**

1. *When defense stricken out — Summary proceedings — Lease.*— In a summary proceeding to dispossess a teannt for non-payment of rent of a dwelling apartment in the city of New York, he must, at the time of filing an answer pleading that the rent is unreasonable, deposit one month's rent as reserved in the lease, and for failure so to do, the defense, on motion of the landlord, will be stricken out. 400 Manhattan Avenue Corp. v. Danziger, 79.

2. *When demurrer sustained — Services — Corporations — Assignments — Stock Corporation Law,* § 66.— Unless it appears in an action to recover upon an assigned claim for services rendered and material furnished by plaintiff's assignor, a corporation, that plaintiff was an officer, director, stockholder or a creditor of the corporation, the assignment is not null and void under section 66 of the Stock Corporation Law and said statute is not a defense to the alleged cause of action. A separate defense, pleading that the assignment set forth in the complaint, was executed by one H. while he was assuming to act as the vice-president of the corporation, and was received by plaintiff with full knowledge and notice of intention to give him a preference "as an alleged creditor" over other creditors of the corporation, and for that reason the assignment is null and void, is provable under the general denial in the answer, and an order overuling a demurrer to the separate defense will be reversed and the demurrer sustained with leave to serve an amended answer. Bulova v. Barnett, Inc., 94.

3. *When motion to strike out defense denied — Use and occupation — Statutes — Tender — Deposit — Tenant out of possession — Laws of* 1920, *chap.* 944, § 6.— In an action for use and occupation the complaint alleged that prior to the commencement of the action defendant vacated the premises, and the answer, after denials of the allegations of the reasonable value of the use and occupation, pleaded as a separate defense that the occupation of the premises was under a special agreement fixing at a sum stated the rent to be paid, conceded that a certain sum was due under said agreement, and pleaded a tender thereof to plaintiff. A motion to strike out said defense was made on the ground that under the statute (Laws of 1920, chap. 444, § 6) it was improperly pleaded unless at the time of answering defendants deposited with the clerk of the court a sum equal to the amount paid as rent during the preceding month or such sum as was reserved as rent under the agreement under which possession was obtained. *Held,* that the defense raised no issue under the statute as to the reasonableness of the amount demanded in the complaint, and the motion will be denied

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though it was conceded that the deposit called for by the statute was not made. It was not the legislative intent that the requirement for a deposit should be applicable except in cases where the tenant is in possession of the premises involved, at the time of the institution of the suit, and a motion to strike out the denials, on the same ground that the motion to strike out the separate defense was made, will be denied. Riccobono v. Cleary, 174.

4. *When demurrer to complaint overruled — Restaurant keepers — Injury to guest — When motion for judgment on the pleadings denied.*— Where in an action by one who while a guest in defendant's restaurant was seriously injured by being struck on the head by a heavy glass water tumbler thrown by a patron of the restaurant, the complaint alleges that defendant had notice, through the continued offensive, boisterous and unlawful conduct of the patron who threw the tumbler, a demurrer to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action will be overruled, and defendant's motion for judgment on the pleadings denied with leave to serve an answer. Molloy v. Coletti, 177.

5. *When demurrer to complaint sustained — Contracts — Negotiable instruments — Damages — Foreign exchange — Personal Property Law,* §§ 145, 145(3), 156.—A complaint alleged a written contract under which plaintiff agreed to sell and deliver to defendant at the city of New York 500,000 French francs, check on Paris, France, at the rate of 8.33 francs per dollar. Within a few days after defendant had notified plaintiff that he repudiated the contract, plaintiff sold the francs in the city of New York at the then current market rate of 16.56 francs per dollar, and at a result of the credit to defendant of the amount realized on such sale, defendant still remained indebted to plaintiff in a certain sum for which judgment was demanded. *Held,* that the measure of damages, in the absence of an allegation of "special circumstances showing proximate damage of a greater amount," was under section 145(3) of the Personal Property Law the difference between the contract price and the market price at the time when the money ought to have been accepted. It appearing that had plaintiff held the money until the date fixed for its delivery, the loss sustained would have been several thousand dollars less than established by the sale, a demurrer to the complaint on the ground that plaintiff in his demand for judgment had adopted the wrong measure of damages, will be sustained. Guaranty Trust Co. v. Meer, 327.

6. *When motion for order requiring plaintiff to serve an amended complaint granted — Allegations contained in complaint — Damages —Actions.*—A plaintiff taking the ground that his complaint states but a single cause of action should plead the facts in such manner as to enable the defendant to hold him to that position throughout the litigation. Where as against the contention of the defendant that the facts alleged in the complaint may readily be made the basis of an action either for an assault, false imprisonment or malicious prosecution, the plaintiff maintains that the allegations of the complaint constitute but a single cause of action growing out of a series of occurrences having relation to but one continuous transaction with special circumstances of injury or aggravation as to

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each step in the progress of the affair, defendant's motion for an order requiring plaintiff to serve an amended complaint separately stating and numbering the facts constituting the various causes of action which defendant claims to be embraced in the complaint, will be granted, unless within the time fixed by the order to be entered plaintiff stipulates in writing that he intends and desires to state only a cause of action for false arrest and imprisonment, and he should specify which allegations are pleaded in chief and which in aggravation of damages. Loew v. Ostreicher Bros., 404.

7. *Foreclosure — Answer — Statute of Frauds — Accounting — When motion for judgment on the pleadings denied.*— Prior to the sale on foreclosure of a mortgage in which plaintiffs and defendant were participating owners, it was orally agreed that plaintiffs would refrain from bidding at the sale and that defendant should become the purchaser of the premises at a price not in excess of the amount due on the mortgage, together with taxes and expenses. Defendant, who bought in the premises at the sale, refused to carry out the agreement and held the property as its own for a number of years, collecting the income, and without notice to plaintiffs, conveyed the property and appropriated the proceeds of sale to its own use. In an action alleging the facts and demanding judgment declaring defendant a trustee for plaintiffs and requiring defendant to account for the proceeds of the sale in excess of the amount adjudged to be due it under the judgment of foreclosure and sale, the answer, besides a general denial, pleaded the Statute of Frauds as a defense. *Held,* that the facts pleaded, if proven, would make out a *prima facie* case, and defendant's motion for judgment on the pleadings will be denied. Fletcher v. Manhattan Life Ins. Co., 409.

8. *When complaint demurrable — Corporations — Use of surname — Civil Rights Law,* §§ 50, 51.— In the absence of equitable considerations, a complaint against a corporation that its use of plaintiff's surname for advertising or trade purposes constitutes a violation of the statute (Civil Rights Law, §§ 50, 51), which prohibits such use, is demurrable on the ground that under the statute alone, the plaintiff is not entitled to an injunction or damages for such alleged use of his surname. Pfaudler v. Pfaudler Co., 477.

9. *When defendant not entitled to an order to compel plaintiff to amend complaint — Carriers — Actions.*— Where a complaint, as a second cause of action, alleges that plaintiffs tendered to the defendant certain shipments of merchandise for transportation to various points upon its own and connecting lines; that defendant supplied for such shipment ordinary box cars, but that plaintiffs, in order to load the cars, either to minimum or maximum capacity, were compelled to equip them with inside or grain doors or bulkheads, at an expense of a specified sum, defendant is not entitled to an order requiring plaintiffs to amend the complaint by separately stating and numbering the causes of action contained in the second cause of action, and defendant's motion for such an order will be denied. Loomis v. Lehigh Valley R. R. Co., 480.

10. *Action for rent — Sub-tenant — Eviction — Counterclaim.*— In an action for rent an answer pleading as a defense the eviction of defendant's sub-tenant, and, as a counterclaim, the damages

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**PLEADING** — Continued.
resulting from such eviction, is on its face sufficient, and a judgment in favor of plaintiff and for the dismissal of the counterclaim will be reversed and a new trial granted. O'Connell v. Sugar Products Co., 540.

See **Bill of Particulars; Contracts; Mechanics' Liens; Negligence; Summary Proceedings.**

**PLEDGE.**
*When doctrine of estoppel does not apply — Conversion — Evidence.*— Where in an action for conversion the evidence is convincing that, notwithstanding a memorandum signed by one at the time plaintiff delivered to her a watch, it was to remain the property of plaintiff and be returned on demand, she was intrusted with the possession of the watch for the purposes of sale, she must be deemed the true owner, and a judgment against the defendant with whom she pawned the watch will be reversed and the complaint dismissed. It appearing that defendant had no knowledge of and did not rely on any previous dealings between plaintiff and the pledgor, the doctrine of estoppel did not apply. Kupchick v. Levy, 533.

**POWER OF SALE.**
See **Wills.**

**PREFERENCE.**
See **Executors and Administrators; Trial.**

**PRINCIPAL AND AGENT.**
See **Ships and Shipping.**

**PROBATE.**
See **Wills.**

**PROCESS.**
*Service by publication. — Where papers must be mailed — When motion to vacate judgment granted — Code Civ. Pro.* § 440.— Service of an order of publication, together with the summons and complaint, by depositing the papers, contained in a securely closed postpaid wrapper, in a letter-box other than in the post-office, is not good. Where an order for the service of the summons directed that a copy of the summons and complaint and order of publication, contained in a securely closed postpaid wrapper, be deposited in the post-office as required by section 440 of the Code of Civil Procedure, but upon application for judgment the only proof of mailing was an affidavit stating that the papers were deposited in a depositary maintained by the United States government in a privately owned building, the defect is jurisdictional and not merely an irregularity, and defendant's motion to vacate the judgment will be granted. Berman, Inc., v. American Fruit Distributing Co., 345.

**PUBLICATION.**
See **Process.**

**REAL ESTATE.**
See **Accounting.**

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**REAL PROPERTY.**
See **Title.**

**REAL PROPERTY LAW.**
1. *Sections* 105, 107 — *When sale of real estate by a testamentary trustee will be approved — Evidence.*—A sale of real estate by a testamentary trustee pursuant to leave granted under sections 105 and 107 of the Real Property Law will not be rejected, because, pending the application for leave to sell and a hearing thereon, there has been an increase in values. The sale will be approved at the price offered, which the testimony shows to have been fair when made and accepted subject to the approval of the court. Matter of Central Union Trust Co., 214.

2. § 378(3) — *Registration of title.*— Matter of Prime, 720.

§ 42. Matter of Fitzsimmons, 71.
§§ 42, 61, 97, 99. Woolley v. Hutchins, 11.
§ 259. Schaefer v. Steuernagel, 546.

**RECEIVERS.**
See **Injunctions.**

**REGISTRATION OF TITLE.**
See **Real Property Law.**

**RELIGIOUS CORPORATIONS.**
*When application for leave to mortgage real property must be on consent of majority of members.*— The trustees of a religious corporation having a congregational form of government have no power to initiate proceedings to sell or mortgage the real property of the corporation without the consent of the members. Under the present Religious Corporations Law such consent of the members given by a majority vote at a meeting, or in some manner in accordance with legally adopted by-laws, is requisite to authorize the trustees to make such an application. The application herein making no reference to any such by-law now in force will be denied with leave to renew on further papers. Matter of Beth Israel of Brownsville, 582.

See **Negotiable Instruments.**

**RES ADJUDICATA.**
See **Mortgages.**

**RESCISSION.**
See **Contracts.**

**RESTAURANT KEEPERS.**
See **Injunctions; Pleading.**

**SALES.**
1. *Action for goods sold and delivered — Retention of partial delivery — Counterclaim — Damages.*— While a vendee who accepts, retains and uses a partial delivery of goods due in a single delivery may be held for the purchase price thereof he is also entitled to relief against the vendor for damages because of delay or default in the delivery of the balance of the goods. An oral contract for the sale of luminette called for the delivery of three pieces at once, and twenty-one pieces to be shipped during the months of October and November, 1919, upon plaintiff's receipt of same. Prior to the date

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**SALES** — Continued.
when payment for the three pieces fell due, the plaintiff had received a number of pieces from his consignor but none had been delivered to defendant though he made frequent requests therefor. Plaintiff's demand for payment for the three pieces was refused because of his failure to deliver the remaining pieces called for by the contract. In an action for goods sold and delivered the defendant counterclaimed for the increased value of the goods not delivered because in the meantime their market price had risen. *Held*, that whether defendant suffered any damages by reason of plaintiff's failure to deliver according to the contract, was a question which should have been submitted to the jury, and a judgment entered upon a verdict directed in plaintiff's favor, after the dismissal of the counterclaim, will be reversed and a new trial ordered. Harris v. Einhorn, 387.

2. *When property in goods delivered to a carrier for transmission passes to the buyer — Contracts — Evidence — Damages — Personal Property Law*, §§ 100, *rule* 4 (1, 2), 144(1).— Under subdivisions 1 and 2 of rule 4 of section 100 of the Personal Property Law the property in goods delivered to a carrier for transmission passes to the buyer and the seller may sue for the purchase price unless subsequently he accepts a return of the goods. In an action under section 144(1) of the Personal Property Law to recover the purchase price of goods sold because of the buyer's alleged wrongful neglect or refusal to pay according to the terms of the contract of sale, it appeared on cross examination of plaintiff's witnesses that at the time of defendant's refusal to accept, there was an available market for the goods which were still in the warehouse where they had been placed by plaintiff upon defendant's refusal to accept, though they had, at the time of the trial, depreciated in value. *Held*, that a dismissal of the complaint on the ground that plaintiff's sole remedy was an action for damages for defendant's nonacceptance of the goods, was error. The erroneous exclusion of evidence which undoubtedly would have shown that plaintiff took back the goods only for the protection of the buyer calls for the reversal of a judgment dismissing the complaint and awarding costs to defendant, and the granting of a new trial. International Cheese Co. v. Garra, 543.

**SALE OF INFANTS' REAL ESTATE.**
See **Judgments.**

**SATISFACTIONS.**
See **Judgments.**

**SEAMAN.**
See **Ships and Shipping.**

**SECURITY FOR COSTS.**
See **Costs.**

**SEPARATION.**
See **Husband and Wife.**

**SERVICE.**
*Substituted — Municipal Court of the city of New York — Corporations — Appeal.*— The Municipal Court of the city of New York has no power to make an order for substituted service of the

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**SERVICE** — Continued.
summons on a corporation defendant. An appeal lies from such an order and it and the order denying the motion to vacate the judgment entered on defendant's failure to appear will be reversed and the motion granted. United States Cast Iron Pipe & Foundry Co. v. Roberts & Co., Inc., 560.

See **Corporations; Process; Surrogates' Courts.**

**SHERIFFS.**

*Duties of — Execution — When motion for an order permitting sheriff to deposit in court before the return day the proceeds of execution sales granted — Judgments — General Rules of Practice, rule* 6 — *Code Civ. Pro.* § 723.— It is the well-settled law of this state that it is the duty of the sheriff, not only to collect the moneys due upon an execution by the return day thereof, but to bring the same into court, or pay it over to the plaintiff or his attorney by such return day. A sheriff, having is his hands sufficient funds, the proceeds of sales of property under an execution, to pay the plaintiff's judgment in full, was served with a notice by the trustee under a trust agreement purporting to have been signed by plaintiff, under which the trustee claimed to be entitled to the money due on the plaintiff's judgment and execution. The trustee denied that the trust agreement had been abandoned, as claimed by plaintiff. *Held*, that a motion by the sheriff for an order permitting him to deposit in court before the return day of the execution, the proceeds of the execution sales and be absolved from further responsibility in relation thereto, will be granted, and the issue as to the ownership of the moneys determined either in an action by the trustee to enforce the trust agreement or by an action brought by the judgment creditor, to set it aside. Had the time for the return of the execution expired, the judgment creditor's remedy would have been either to compel a return by the sheriff under rule 6 of the General Rules of Practice, or to bring an action for damages against him. The mistake of entitling the motion papers, in the action brought against him as sheriff by one of the judgment creditors, is a mere irregularity which the court under section 723 of the Code of Civil Procedure may correct, where the substantial rights of other parties in interest are not affected. The claims of the judgment and attachment creditors of the judgment debtor cannot be settled on this motion, although they have been served with notice thereof, for the right of the party claiming the money being in doubt, the court will relegate her to her action. Buckley v. Sharpe, 206.

**SHIPS AND SHIPPING.**

1. *Contracts for towage — Principal and agent.*— The captain of a schooner has implied power to bind his own principal by a contract for the towage of the ship. Where the captain of a schooner made a contract with plaintiff to tow the ship, the person for whose benefit the ship is operated on the particular voyage in which the expense for towage was incurred, not the actual owner of the ship, is the principal of the captain and is liable upon the contract for towage. Where payment for the services rendered was refused on the ground that defendant was not the owner of the schooner and that the captain was not defendant's agent but the agent of the actual owner, a judgment dismissing the complaint will be reversed

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**SHIPS AND SHIPPING** — Continued.
and judgment directed in favor of plaintiff. Potter v. American Union Line, Inc., 101.

2. *Contracts — Terms of — Evidence — Rates — Trial.*— The only issue litigated in an action for the non-delivery of three cases of goods delivered by plaintiffs to defendants at the city of New York for shipment to a foreign port, was whether defendant's liability was limited to $100 for each case lost, and though the evidence showed that defendants had two rates, one of which was *ad valorem*, the trial justice, in spite of a clause in the bill of lading issued at the time the goods were delivered to defendant, which provided that "unless a higher value be stated herein, the value of the goods does not exceed $100 per package, nor $8 per cubic foot, and the freight thereon has been adjusted upon such valuation, and no oral declaration or agreement shall be evidence of a different valuation," gave judgment in favor of plaintiff in the sum of $688, the actual value of the goods which had been lost. *Held,* that said clause was of itself a statement that the rates were based upon a valuation of $100 and constituted a notice that if the shipper desired to place a higher valuation on the goods shipped, he must pay a higher rate. The contract in terms showing the existence of an *ad valorem* rate, the plaintiff, which had been in the export business for several years, would have had notice of essential choice of rates had it read the contract or acquainted itself with its terms, and the judgment in its favor will be reduced to $288 and, as so modified, affirmed. Starace & Co., Inc., v. Raporel S. S. Line, Inc., 111.

3. *Discharge of cargo — lease of off-shore berth — Lighters — Evidence — Contracts — Custom and usage.*— The hiring of an off-shore berth on a North river pier means that the ship discharges its cargo off the side into lighters or scows. One side of a North river pier leased by defendant for an off-shore berth was occupied by one of its steamships for five days and the stipulated *per diem* rate paid. The lighters remained in the berth five days longer. In an action to recover an additional charge at the same *per diem* rate a witness for plaintiffs on his direct examination was asked: "What is the custom with regard to an off-shore berth, are lighters considered part of the ship for the transaction?" to which the witness answered "in this special case, yes." *Held,* that defendant was entitled to show whether it had control over the lighters after its steamship had left the pier, or whether it had any connection with the owner of the cargo, and that the exclusion of such testimony was error for which a judgment in favor of plaintiffs will be reversed and a new trial ordered. Carroll v. Harris, 392.

4. *Injury to seaman upon the high seas — Obligation of ship for care and maintenance of disabled seaman — Jurisdiction.*— The obligation of a ship to care for a seaman if he becomes ill or is injured while in service continues for a reasonable period after the termination of his employment. The seaman's maritime right to maintenance and care for a reasonable time after his employment ceased may be enforced in the state courts. Where the seaman met with an accident incidental to his service while the ship was on the high seas and only a short distance from some of the large ports of South

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**SHIPS AND SHIPPING** — Continued.
America, a cause of action alleged in the complaint for defendant's failure to furnish plaintiff with reasonably good medical attention turned on the question whether plaintiff requested to be landed at one of those ports, was decided in his favor though he was brought to New York. A motion for a new trial will be granted unless plaintiff consents to the reduction of a verdict of $1,200 to $500, in which event the motion will be denied. Falk v. Thurlow, 586.

See **Injunctions.**

**SPECIFIC LEGACIES.**
See **Wills.**

**SPECIFIC PERFORMANCE.**
*Land contracts — Principal and agent — Parol evidence — Statute of Frauds.*— While a writing, not under seal, signed for an undisclosed principal by an agent renders him personally liable, the undisclosed principal may be held liable upon proof of the signer's agency. The fact that the question arises under the Statute of Frauds does not change this rule, and parol evidence to show the existence of the principal neither offends the statute nor tends to vary the terms of the writing. Where in a buyer's action for the specific performance of a land contract, not under seal, all disputed questions of fact were decided in favor of plaintiff, and the only contention was whether the writing which was signed by the agent of the seller whose name did not appear, was a sufficient memorandum under the Statute of Frauds, the rule relating to an undisclosed principal applies, the writing is sufficient, and the plaintiff is entitled to judgment against the undisclosed principal. Byrne v. McDonough, 529.

See **Judgments; Court of Claims; Highways.**

**STATE CONSTITUTON.**
Art. III, §§ 19, 28. Dale Engineering Co. v. State of New York, 233.

**STATE FINANCE LAW.**
Section 35. Heinemann v. State of New York, 265.

**STATUTE OF FRAUDS.**
*Sale of real estate — Insufficient memorandum — Contracts — Specific performance — When complaint dismissed.*— Where by an oral contract for the purchase of real estate it was agreed that the balance of the purchase price, after certain cash payment, should be paid by plaintiff assuming an existing mortgage on the property and giving a mortgage for the difference, a writing which while acknowledging receipt of the cash payment, did not specify the terms of the mortgage to be given, how long it was to run or the rate of interest, is an insufficient memorandum under the Statute of Frauds and the complaint in an action for specific performance of the contract will be dismissed, but without costs. Schubach v. Konshner, 354.

See **Pleading; Specific Performance.**

**STATUTE OF LIMITATIONS.**
See **Court of Claims; Partnership.**

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**STATUTE OF WILLS.**
See **Deeds.**

**STATUTES.**
1. *Construction of — meaning of words "occupied for dwelling purposes" — Summary proceedings — Landlord and tenant — Laws of* 120, *chap.* 942.— Although the legislative intent in the use of the words "occupied for dwelling purposes" in the statute (Laws of 1920, chap. 942) by which a landlord's remedy by summary proceedings is suspended, etc., means an occupation *by the tenant* for such purposes, and the statute should not be so construed as to include premises which are occupied by the tenant for the purpose of providing dwelling or shelter to others for the tenant's profit, the legislature did not intend, however, to exclude from the operation of the statute premises occupied as a dwelling, not only by the tenant, but also by self-supporting members of the family or paying guests not related and perhaps strangers to the tenant, so long as such renting of the premises is merely incidental to the tenant's occupation. May v. Dermont, 106.

2. *Repeal of Laws of* 1822, *chap.* 127, *by resolution of board of supervisors of Seneca county — Jury districts — County Law,* § 12(14).— The board of supervisors of Seneca county by virtue of section 12(14) of the County Law had plenary power to adopt the resolution of August 30, 1920, abolishing the two jury districts into which by chapter 127 of the Laws of 1822 said county was divided, and providing that thereafter the county should consist of a single jury district. The repeal of the said statute of 1822 was accomplished not by the County Law but by the resolution of the board of supervisors on August 30, 1920, which has the same force as a statute passed by the legislature itself. Matter of Seeley, 633.

See **Constitutional Law**; **Costs**; **Court of Claims**; **Damages**; **Executors and Administrators**; **General Business Law**; **Injunctions**; **Landlord and Tenant**; **Liquor Tax Law**; **Negligence**; **Pleading**; **Summary Proceedings**; **Transfer Tax**; **Wills.**

**STOCK CORPORATIONS LAW.**
§ 15, Publicker Commercial Alcohol Co. v. Roberts, 551.

**STREET RAILWAYS.**
See **Writ of Prohibition.**

**STRIKES.**
See **Labor Unions**; **Picketing.**

**SUBSTITUTED SERVICE.**
See **Service.**

**SUMMARY PROCEEDINGS.**
1. *When will not lie against tenant on the ground of expiration of term — Landlord and tenant — Lease — Code Civ. Pro.* § 2231 (1-*a*) *added by Laws of* 1920, *chap.* 942.— Under section 2231 of the Code of Civil Procedure, as amended by chapter 942 of the Laws of 1920, by adding subdivision 1-a to the effect that no sum-

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**SUMMARY PROCEEDINGS** — Continued.
mary proceeding "shall be maintainable to recover the possession of real property * * * occupied for dwelling purposes," summary proceedings on the ground of the expiration of the term will not lie against the tenant of several floors of a private house which have been sublet and are used exclusively for dwelling purposes, and a final order in favor of the landlord will be reversed and final order directed in favor of the tenant. Jackson v. Grey, 92.

2. *Statutes — Landlord and tenant — Trial — Pleading — Evidence — When final order reversed and new trial granted.*— A summary proceeding under the statute (Laws of 1920, chap. 942) was instituted upon a landlord's petition alleging that he was in good faith seeking to recover possession of an apartment occupied by the defendant tenant in petitioner's ten-family apartment house, for the immediate and personal use of himself and family, as a dwelling. The answer was a general denial, and the landlord on his direct examination was asked: "Do you intend to occupy for yourself as a dwelling place for yourself and family, for usual purposes, the apartment now occupied by" the defendant tenant. An objection by the tenant's counsel that the answer called for a conclusion was sustained and exception taken. The court correctly charged that the good faith of the landlord in the matter was a question for the jury. *Held*, that the exclusion of the testimony sought to be elicited by the question was error for which a final order in favor of the tenant entered upon the verdict will be reversed and a new trial granted. Kahrs v. Eygabroad, 395.

3. *When will not lie against tenant as a holdover — Landlord and tenant — Lease.*— The agreement of a tenant that in case of a sale of the premises he will vacate them on thirty days' notice, is a condition and not a conditional limitation of the lease. While the refusal of a tenant to vacate the premises on the day set by such a notice entitles the landlord to bring an action in ejectment or for breach of covenant, the tenant is not a holdover until his lease expires, and summary proceedings will not lie against him as a holdover. Weinman v. Trainor, 403.

See **Lease; Pleading; Statutes.**

**SURROGATES' COURTS.**

1. *Jurisdiction — When real estate of surety not impressed with an equitable lien — Executors and administrators — Trustees.*— Upon a stipulation between the temporary administratrix of an absentee and the substituted trustee, the amount of the defalcation or indebtedness of the absentee, as testamentary trustee, was agreed upon and approved by the surrogate and though no order was entered the amount so agreed upon was accepted by the administratrix as a claim against the estate of the absentee. An order duly granted directing the sale of two certain parcels of real estate of the absentee provided that the right, lien or claim of priority of claimant or equities of the substituted trustee, who objected to the sale of one of the said parcels, be transferred to the avails from the sale of the said real estate and the right thereto determined when the matter of the disposition of the proceeds of the sale of both parcels came before the court for determination. The father of the absentee who was one of the sureties on his official bond as testa-

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**SURROGATES' COURTS** — Continued.
mentary trustee, devised the parcel, the sale of which was objected to by the substituted trustee, to his widow for life, since deceased, then to the absentee. Upon the judicial settlement of the accounts of the administratrix, all necessary parties being in court, *held,* that the court had jurisdiction to determine the rights of the various creditors and claimants to payment out of the proceeds of the real estate including the parcel devised to the absentee by his father's will. The claim of the substituted trustee to be entitled to priority or preference of payment from the proceeds of the sale of the real estate devised to the absentee, on the ground that he received it impressed with an equitable lien from his father who was surety for the faithful performance of the absentee's official duties as testamentary trustee and also subject to the absentee's liability as an heir of such surety, cannot be allowed and the proceeds of sale must be applied *pro rata* in satisfaction of all of the obligations of the absentee. Matter of Sullard, 288.

2. *Service by publication — Probate — When motion to vacate service of citation by publication denied — Wills.*— The presumption in favor of the regularity of judicial process should not be lightly disregarded, and the statement in the moving affidavit on a motion to vacate the service of the citation to attend the probate of a will, that "I did not receive the citation or summons by mail" cannot be accepted as a reason for opening up the decree admitting the will to probate. Matter of Rowley, 375.

See **Verdict.**

**SUSPENSION OF POWER OF ALIENATION.**
See **Wills.**

**TAXES AND ASSESSMENTS.**
See **Foreclosure.**

**TAX DEEDS.**
See **Title.**

**TAXICABS.**
See **Mandamus.**

**TAX LAW.**
§ 4(7)— *Real estate of fraternal corporation, if leased, not exempt from taxation.*— Power to lease given by the by-laws of a fraternal corporation is not equivalent to a declared purpose to lease set forth in its incorporation papers, and where such a corporation, having leased its real estate to other fraternal bodies at an annual rental, fails to establish that it was created for that purpose, the real estate is not exempt from taxation under section 4(7) of the Tax Law. People ex rel. Buffalo Consistory v. Betz, 124.

§ 2(8), People ex rel. Astoria Light, Heat & Power Co. v. Cantor, 419.
§ 4(7), People ex rel. Buffalo Consistory v. Betz, 124.
§§ 132, 134, Dodd v. Boenig, 144.
§ 220, Matter of Einstein, 452.
§ 220(2), Matter of McMullen, 505.
§§ 220(3), Matter of Keith, 86.

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**TAX LAW** — Continued.
§§ 220(6), 221(b), 230, 241, Matter of Canda, **161.**
§ 221, Matter of Beekman, 73.
§ 221, Matter of Cash, 641.
§ 221(b), Matter of Kolb, 361.

**TAXES.**
See **Certiorari; Transfer Tax.**

**TENDER.**
See **Pleading.**

**TESTAMENTARY PROVISIONS.**
See **Wills.**

**TESTAMENTARY TRUSTEES.**
See **Accounting.**

**TITLE.**
*Action to quiet — Tax deed — Real property — Tax Law,* §§ **132,** 134.— In an action to quiet title brought by the owner in possession of certain real property against the purchaser at a tax sale who never was in possession, to set aside and cancel the tax deed given to defendant by the county treasurer, it appeared that through a clerical error in the tax office a double assessment was levied against the property, one running against the owner, which was paid, and one against an unidentified person. *Held,* that the recording of the tax deed without proof of service of the notice required by section 134 of the Tax Law, which the purchaser at the tax sale did not give, was void, and that plaintiff was not barred by section 132 of the Tax Law from asserting her right to have the tax deed canceled. Dodd v. Boenig, 144.

See **Contracts; Judgments.**

**TORT.**
See **Negligence.**

**TRADE MARKS.**
See **Mandamus.**

**TRADING WITH THE ENEMY ACT.**
§ 7, Matter of Kuntzsch, 694.

**TRANSFER TAX.**
1. *What not subject to — Partnership agreement — Good will — Evidence — Services — When deduction from net profits for salaries unauthorized.*— Where by a partnership agreement the money standing in the name of a partner is to be credited on the first days of January and July in each year, the share of a partner in the capital with interest to the date of his death, September 2, 1917, represents the value of the transfer at his death and a claim of the executors in a transfer tax proceeding that the interest be discounted to January 1, 1918, is properly disallowed. The partnership agreement provided that the capital of the member of the firm who died during the continuance of the copartnership should remain

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**TRANSFER TAX** — Continued.
in the business for a period of not exceeding nine months subsequent to his death and that his personal representatives should receive the same interest on capital and the same share of the profits for that period as was provided by the copartnership agreement. *Held,* that as the profits for the nine months succeeding decedent's death were not due and payable under the partnership agreement until the expiration of the period therein fixed, and carried no interest, the amount of said profits should be discounted so as to ascertain its value as of the date of decedent's death. The business of the firm was that of selling goods on commission and the unusual earnings for the years 1916 and 1917, which the transfer tax appraiser in estimating the value of the good will included in his average of profits, were due solely to the extraordinary increase in the inventory value of the merchandise, on the sale of which commissions were received. *Held,* that in the circumstances the profits for those years should have been excluded. The profits of the year 1914 should have been eliminated because of the conditions which resulted in profits far below normal earnings, and the average for 1912, 1913 and 1915 should have been taken as the basis for estimating the value of the good will. The five per cent. of profits which, under the partnership agreement decedent was entitled to receive, should have been applied to the good will value of the business in ascertaining his interest therein. No proof having been offered of the nature, extent or value of the services, if any, rendered by decedent and his copartners to the firm, a deduction from the net profits, for salaries to the copartners, was unauthorized and properly disallowed by the transfer tax appraiser. Matter of Lincoln, 45.

2. *What subject to — Association for benefit of a family not exempt — Tax Law,* § 221.— The "Beekman Family Association" which was incorporated under the Membership Corporation Law by members of the Beekman family, including the testator, does not come within the class of corporations entitled to an exemption under section 221 of the Tax Law, and property passing to said association, as residuary legatee, is subject to a transfer tax. Matter of Beekman, 73.

3. *What subject to — Non-residents — Tax Law,* § 220(3).— Where a non-resident testator left a taxable estate in this state, the proper basis under section 220(3) of the Tax Law for prorating the various amounts taxable on the transfers under the will, is the total amount of the real and personal property transferred, and where the transfer tax appraiser did not include the real estate in his computations, the matter will be remitted to him for correction. In a transfer tax proceeding the appraised value of the entire estate should be submitted under oath and not in the form of a letter by the attorney for the executors, setting forth his estimate of such value. Matter of Keith, 86.

4. *What subject to — Domicile — Wills — Statutes — Power of appointment over personal property without state — Tax Law,* §§ 220(6), 221(b), 230, 241.— There is no sound reason why estates transmitted by means of powers of appointment created by will should not be governed by the same rules which control the devolu-

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**TRANSFER TAX**—Continued.
tion of estates by other methods. The right to take property by devise or descent is not a natural right and the sovereign power of the legislature which confers this privilege may impose conditions thereon. The state of the domicile of a decedent fixes the *situs* of his personal property for the purposes of taxation, although such property is actually without that state. A tranfer of trust property effected by the exercise by decedent, who died a resident of this state, of powers of appointment created by the will of her father and grandfather, who were residents of a sister state in which the trust property is located and where her will was probated, is subject to a transfer tax under section 220(6) of the Tax Law. Where, however, it appears that decedent by her will exercised the powers of appointment in favor of her trustees, with life estates to her children, and that the transfer to them is part of what they would have received under the wills of their ancestors if the powers had not been exercised, and said children elect to take under said wills, their life estates are not subject to a transfer tax. The will of decedent herein provided that in default of the exercise of new powers of appointment given thereby the remainder should vest in the issue of her children or in default of issue in their next of kin under the law of the state in which the trust property was located. Her executors appealed from an order assessing the tax, which included as taxable the transfers effected by the exercise of the powers of appointment, on the ground that if such transfers were taxable, the remainders should be suspended from taxation until the determination of the question whether the donees of the new powers shall exercise them. *Held*, that section 230 of the Tax Law, as amended in 1911, and section 241 of said statute, require that the tax upon the remainders shall be presently imposed; if the new powers are exercised by the children of decedent, no tax will be due from her estate, and a refund by the state may be compelled; if, however, the appointment is not made by their wills, the state will be protected. Appeal of the executors against a tax under section 221(b) of the Tax Law, on securities in the trust fund in the sister state, sustained, but their appeal on the refusal to deduct the federal inheritance tax denied. Matter of Canda, 161.

5. *What subject to — Estates in expectancy — Wills — Motions and orders — Life estates — Invalid exercise of power of appointment.*— The will of a decedent, who died in 1904, directed the division of his residuary estate into two parts, the income from one to be paid to his son for life, and on his death the share to pass to his issue. In case no children survived the son, then the income was to be paid to decedent's daughter during her life, and upon her death the share to pass to her issue, and if no issue, then to whomsoever she should appoint by her will. Alternative provision was also made in respect to the other half, the income from which was to be paid to the daughter. She died without issue in 1913, leaving her residuary estate to her brother who died testate in 1918. In an action by the executors of the son for the settlement of his account as trustee under the will of his father, it was held that the attempted exercise by the son, in his will, of the power of appointment given to him under his father's will, was invalid, and that there was a reversion in the estate of the father which passed as if he died intestate,

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because no provision was made for the disposition of the remainders in case of the failure of the exercise of the power of appointment. It was also held that the powers were contingent because they might be defeated if either of the children of the father died leaving issue. In the transfer tax proceedings in the estate of the father the appraiser found the value of the life estates of the son and daughter, but suspended taxation on the remainders because of the powers of appointment thereover, and the order entered on the appraiser's report contained no reference to the remainders. *Held*, that a contention of the executors of the father's estate that the latter part of section 220(5) of the Tax Law (Laws of 1897, chap. 284) providing for the taxation of the non-exercise of the power in the donee's estate, which was in effect when the father died but repealed by chapter 732 of the Laws of 1911, which was in effect prior to the death of the son, exempted the non-exercise of the power from taxation, could not be sustained, and since no transfer took place in the donee's estate the legislature was without power to tax the property in his estate, the transfer tax must be paid on the only transfer effected, which was in the donor's estate; hence the taxation of the estates in expectancy was held in abeyance, and they may be presently taxed against the persons in whom they vested in possession and enjoyment on their full, undiminished value. An application to vacate an order appointing a transfer tax appraiser on the ground that the estate of the decedent herein was not subject to further transfer tax, treated as a motion to fix the tax without the appointment of an appraiser, and the order entered will provide for vacating the order heretofore made appointing the appraiser. Matter of Duff, 309.

6. *What not subject to — Statutes — Trusts — Affidavits — Tax Law*, § 221(*b*) — Code Civ. Pro. § 829. — The statute imposing a transfer tax, being a special tax law, will be construed strictly against the state and favorably to the taxpayer to the end that he may not be subjected to special burdens without clear warrant of law. Where the appraiser in fixing a transfer tax included a savings bank account standing in decedent's name in trust for his daughter, but the proof embodied in an affidavit of the daughter is that the moneys in said account were her own, derived from gifts to her from various persons, and intrusted by her to decedent who deposited them in the trust account, and that the only withdrawal therefrom was made by him at her request and the money delivered to and used by her, the account should not have been included in the appraiser's report as subject to a transfer tax. A contention that section 829 of the Code of Civil Procedure applies to the affidavit made by the daughter is untenable, and while the fact that the affidavit is self serving must be considered in deciding what weight should be given to it, the court is not warranted in disregarding it particularly as its recitals stand uncontradicted and unimpeached. Only such transfers of investments as are taxable under article 10 of the Tax Law become liable to taxation under section 221(b) of the Tax Law, which was in force at the date of decedent's death, but before the tax thereunder is imposed the value of the transfer should be ascertained by deducting from the value of the investments so much of the debts as are chargeable against them. In



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**TRANSFER TAX** — Continued.
appraising the fair market value of the transfer of such investments at the time of decedent's death, the accrued interest thereon to that date must be included. Matter of Kolb, 361.

7. *Transfers in contemplation of death — Insurance (life) — Assignments — Tax Law*, § 220.— Where decedent, three days before he died, and aware that he had but a short time to live, assigned to his son-in-law certain life insurance policies, which in their original form would have been taxable as part of his estate, it will be held that the assignments were "made in contemplation of death" within the meaning of section 220 of the Tax Law, and they are subject to a transfer tax on the amount actually received by the beneficiary, discounted as of the date of the assignments. Matter of Einstein, 452.

8. *Transfer of stock of foreign corporation owning real estate within the state of New York, the stock of which is owned by a non-resident decedent, is taxable — Constitutional law — Tax Law*, § 220(2).— The provision of section 220(2) of the Tax Law fixing for the purposes of a transfer tax the interest of a non-resident decedent in shares of stock in a foreign corporation owning real estate in the state of New York, as such proportion of the value of decedent's stock as said real estate bears to the value of the entire property of the corporation, wherever situated, is a valid exercise of the taxing power and is constitutional. Even if at the time of decedent's death the certificate was not in this state, the transfer of his interest as stockholder in the real property here would be taxable. The language of said section 220(2) is not confined to corporations exclusively engaged in holding real estate but applies to all foreign corporations owning real estate in the state of New York. Matter of McMullen, 505.

9. *When corporate trustee not exempt under section 221 of the Tax Law.*— The Title Guarantee and Trust Company is not in any sense or for any purpose a corporation belonging to any of the classes mentioned in section 221 of the Tax Law, and a bequest to said company as trustee, to expend the income for an obviously educational and charitable purpose, is subject to a transfer tax. Matter of Cash, 641.

**TRESPASS.**
See **Adjoining Land Owners.**

**TRIAL.**
1. *Jury — False answer of juror as to qualifications — Affidavits — Motion to set aside verdict granted.*— To permit one to sit as a juror who gave a false answer to a material question, is a fraud upon the court and the parties, and an order denying a motion to set aside the verdict on the ground of misconduct of said juror will be reversed and the motion granted. Upon motion to set aside a verdict in favor of plaintiff, for misconduct of a juror in giving a false answer to the question whether he knew the defendant or any of its officers, put to him before he was accepted as a juror, the principal moving affidavits tended to establish that after the verdict

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**TRIAL** — Continued.
said juror in the presence of several persons admitted that he did know the defendant and was prejudiced against it, and that he had gratified this prejudice by influencing his fellow jurors in plaintiff's favor. All this, together with other matters stated in the moving affidavits, was denied by the juror in his answering affidavit. *Held,* that an order denying a motion to set aside the verdict will be reversed and a motion granted in the interests of justice. Harris v. Eclipse Light Co., 399.

2. *Trial — Inherent power of court to direct preference — Code Civ. Pro.* § 793 — *Judicial discretion.* — Clarke v. Eighth Avenue R. R. Co., 707.

See **Vendor and Purchaser; Venue.**

**TRUSTEES.**
See **Surrogates' Courts.**

**TRUSTS.**
See **Transfer Tax; Wills.**

**UNDERTAKINGS.**
See **Arrest.**

**UNITED STATES CRIMINAL CODE.**
§ 37. Burgess Bros. Co., Inc., v. Stewart, 673.

**UNITED STATES REVISED STATUTES.**
§ 3701. People ex rel. Astoria Light, Heat & Power Co. v. Cantor, 419.

**UNITED STATES SHIPPING ACT (39 U. S. Stat. at Large, 728).**
§§ 14, 16. Burgess Bros. Co., Inc., v. Stewart, 673.

**USE AND OCCUPATION.**
See **Pleading.**

**VENDOR AND PURCHASER.**
1. *Contract for sale of real estate — When vendee cannot recover down payment — Evidence — Trial — Real Property Law,* § 259. — Under section 259 of the Real Property Law the vendee is not required to sign a contract for the sale of realty. Where a contract for the sale of realty was not signed by the vendee, he may not, in an action on the contract, to which the Statute of Frauds might be pleaded in bar, recover his down payment on the purchase price, unless the failure to perform the contract is ascribable to the vendor. The trial court, upon the sole ground that the contract did not bind the plaintiff because he had not signed it, refused on objection of plaintiff's counsel to receive the contract in evidence, and for the same reason gave judgment in favor of plaintiff. All offers of testimony by defendant tending to show that he had acted in good faith and was at all material times ready, willing and able to complete the transaction, were excluded on the ground of immateriality. *Held,* that the view taken by the trial court was erroneous, and that as plaintiff had not made out a *prima facie* case the testimony excluded, though not necessary at the time offered,

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**VENDOR AND PURCHASER** — Continued.
was very material, and the judgment must be reversed and a new trial ordered. Schaefer v. Steuernagel, 546.

2. *When money paid as part of purchase price of real estate cannot be recovered — Contracts.*— Where in an action to recover money paid as part of the purchase price for the sale of real estate, it appears that plaintiff, upon tender of the contract as agreed to, refused to accept, insisting that it should recite "subject to violations to date of taking title," to which defendant did not agree, the plaintiff is not entitled to recover, and a judgment in his favor will be reversed and the complaint dismissed. Gitzelter v. Grossman, 557.

**VENUE.**

1. *Changed to proper county — Code Civ. Pro.* § 984.— Where after a jury had been impaneled for the trial of an action brought in the county of New York the court, upon learning that the cause of action arose and both parties resided in the county of Kings, refuses to try the case in view of section 984 of the Code of Civil Procedure, defendant's motion to transfer the cause to Kings county will be granted. *It seems* that the court had power of its own motion to summarily order the trial of the case in the county of Kings. Block v. Bacon Coal Co., 54.

2. *Where defendant does not waive to change place of trial — Landlord and tenant.*— The defendant in demanding that the venue be changed as a matter of right did not thereby waive her right to make a motion to change the place of trial on the ground that the conveniences of witnesses and the ends of justice would be promoted. Northway Holding Co., Inc., v. Parker, 57.

**VERDICT.**

*When the court may direct a verdict upon a contested probate — Surrogates' Courts — Trial — Evidence — Wills.*— It is only when a verdict rendered upon a contested probate must be set aside as unsupported by the evidence that the court may direct a verdict. Where a will was executed under the supervision of a lawyer, the presumption is that the formalities of the Statute of Wills were complied with, and when the proof is ample to indicate due execution that issue may be taken from the jury and the surrogate may direct a verdict in favor of the will on that issue. Where the contestants failed to give evidence of direct pressure upon the testator or produce evidence which will support a verdict that the will was a product of undue influence, coercion, duress, fraud or restraint of any kind or character, the consideration of such issues will be withdrawn from the jury and a verdict directed in favor of the will. Where the only inference to be drawn from all the evidence, by reasonably-minded men, is that the testator when he made his will possessed the mental capacity required by law, no question of fact is left for the jury, and as it would have been the duty of the court to set aside a verdict against the will, as against the evidence, a verdict in favor of the will upon that issue will be directed in favor of the will. Matter of Tymeson, 643.

See **Trial.**

**WAREHOUSEMEN.**

See **Contracts.**

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**WILLS.**

1. *Construction of — How validity of a testamentary disposition of real estate in this state by a non-resident testator is controlled — Trusts — Suspension of power of alienation — Corporations — Power of sale — Annuities — Devise — Vesting — Gifts — Decedent Estate Law,* §§ 44, 45, 47 — *Real Property Law,* §§ 42, 61, 97, 99 — *Code Civ. Pro.* § 1836-*a.*— The validity of a testamentary disposition of real estate in this state by a non-resident testator is controlled by section 47 of the Decedent Estate Law. By a trust created by the will of a non-resident testator who left very little property other than common and preferred stock in a corporation and certain unproductive real estate in this state of the value of $150,000, there was given outright to certain designated employees of the corporation, divided into classes, the amount of property which the testator intended they should receive at his death, with a *proviso* that the right of any employee to participate in the distribution of the principal, which was not to be made until after the lapse of ten years even though the three life beneficiaries died long prior thereto, was contingent upon such employees remaining in good standing in the active employment of the company, its successors and assigns, until the expiration of the trust period. It was further provided that in default of such continued employment, the benefit intended for such employees should end and "be treated as if never conferred" and the testator left it entirely to the officers of the corporation to terminate the employment of any employee and made the action of said officers with respect thereto as final and conclusive as a voluntary relinquishment of employment. The trustees, being unable to dispose of the real estate, a part of the residuary estate, because prospective purchasers question whether those represented by the trustees take the real estate, and whether if the heirs of testator take the remainder, the trustees have power to sell the real estate, bring this action under section 1836-a of the Code of Civil Procedure and sections 44 and 45 of the Decedent Estate Law against the heirs of testator, his widow and his former wife for a construction of the will, and it is conceded that the trust is void under the statute (Real Property Law, §§ 42, 61) providing against the suspension of the power of alienation for a longer period than two lives in being and forbidding the accumulation of rents and profits save as authorized by law. *Held,* that the remainder did not vest in the remaindermen on the death of the testator but that their interests were contingent, and as to the principal were intended to vest only at the expiration of the trust period, provided that in the meantime they remained in the active employment of the company and in good standing, and that to delete the invalid provisions of the will and declare that the remainder vested in the employees immediately upon the death of the testator would be in effect to make a new will. The case held to come within the rule that where there is not a direct devise or bequest to remaindermen but merely a direction to executors or trustees to pay over to or divide among a class at a future time, the vesting does not take place until the arrival of that time, and the gift is contingent upon survivorship and futurity is annexed thereto. The heirs of the testator took the real estate subject to charges thereon for the payment of an annuity to the first wife of testator, to the payment of his debts and funeral expenses and inheritance taxes and any other public or governmental charges and to the payment of money legacies given by the will if

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**WILLS** — Continued.
needed therefor, and also subject to the exercise of the power of sale conferred upon the executors and trustees for any authorized purpose. While the attempt of testator to confer authority upon his executors and trustees to sell the real estate for the purposes of the invalid trust falls with it, yet if a sale of the real estate be necessary to render effectual any of the valid provisions of the will or to enable the executors and trustees to perform any of their duties, they are authorized to sell under the power of sale, which under sections 97 and 99 of the Real Property Law is valid as a power in trust. Woolley v. Hutchins, 11.

2. *Construction of — Power of sale — Equitable conversion — Suspension of power of alienation — Real Property Law*, § 42.— A will empowered and directed the executor to sell and convey the real estate of his testatrix at such time as he might deem proper, "but not less than two years after my death," with direction to distribute the proceeds among designated legatees. *Held*, that the power of sale was mandatory and worked an equitable conversion of the real estate. While under section 42 of the Real Property Law the limitation of the power of sale could not be given effect, the intention of the testatrix that her property should be sold and distribution made as provided by her will, could be carried out by eliminating the attemped unlawful suspension of the power of alienation, the limitation should be treated as directory merely and not as of the essence of the power of sale. Matter of Fitzsimmons, 71.

3. *When probate decreed — Husband and wife — Decedent Estate Law*, § 35.— Upon the death of a wife in this state, her last will and testament, executed in another state while she was unmarried, may be admitted to probate in this state, under section 35 of the Decedent Estate Law, though her surviving husband was not mentioned in the will. Matter of Cutler, 203.

4. *Construction of — Intention of testator — Life estates — Gifts — Power of sale — Sale of real estate — Executors and administrators.*— Where an estate is given in one part of a will in clear and decisive terms, it cannot be taken away or cut down by raising a doubt as to the meaning or application of a subsequent clause, nor by any subsequent words which are not as clear and decisive as the words granting the estate. The intention of the testator as clearly shown by a certain paragraph of his will, which was drawn by an inexperienced layman, was to give to his wife all his estate, real and personal, subject to two conditions: 1. That she should provide a suitable home for his children, maintain them and give them an education 2. That when they respectively arrived at the age of twenty-one years, she should pay each of them $500, except that she should pay to or for the benefit of one son, the sum of $700. *Held*, that as to give effect to a succeeding provision, that in the event of the death of the mother before any of the children attained their majority, testator's property should be sold and divided and go to his four children, share and share alike, would of necessity convert the estate of the wife from a fee into a conditional life estate until at least one of the children became of age, such provision should be construed as precatory, and so construed was consistent with the absolute gift to the wife. A still later provision, that in

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the event of the death of the wife after either of the children arrived at the age of twenty-one years and they had received the sums mentioned, then the estate should be sold and the proceeds given to the children in equal shares with deductions of sums already paid to them, is so indefinite and ambiguous that it cannot be given effect to cut down the gift to the wife. A provision vesting in testator's wife full power to sell and convey any portion of the estate with the consent and approval of one son and the daughter, the proceeds of such sale to be applied to any debt that might be a claim against the estate, was not necessarily to be construed as indicating any intention of testator to give his wife only a life estate. The absolute gift to the wife was not rendered void because of her failure to pay the sums as conditioned by the gift to her, because the children could enforce the payment of the amount due or to which they were entitled under the provision of gifts to the wife, against her estate. Matter of Fredenburg, 299.

5. *Construction of — What does not work a forfeiture of a legacy — Gift over — Accounting.*—A testamentary provision that in case any beneficiary shall directly or indirectly contest or litigate the validity, factum or effect of the will in any action or proceeding with a view to void or annul the will, the legacy of such contestant shall be revoked and any devise or bequest in favor of such contesting person shall be absolutely void, and the will take effect and be administered as though such contesting person predeceased the testator, does not work a forfeiture of the legacy to a contestant, unless there is a gift over in case of breach of the condition, and a gift of the residue is not such a gift over. Matter of Fox, 368.

6. *Construction of — Specific legacies — Corporations — Partnership agreements.*—An agreement between partners, contemplating the incorporation of their business as a publishing company, stated that it was the desire of both to retain within their own control, so far as possible, the entire management of the corporation about to be formed, with power to purchase each other's stock. *Held,* that this option only existed during the lifetime of the parties. One of the partners who at his death, twenty-five years later, was the owner of three-fourths of the capital stock of the company, bequeathed one hundred and eighty shares thereof to his sister, cousin and three of his associates in the business, in different allotments, with proviso that if any of said legatees should not survive him the share which such legatee would have received should go to his or her surviving children in equal shares, or in default of such issue surviving the testator, then such shares should go to the next of kin of each of the original legatees in equal shares, *per stirpes* and not *per capita.* The remaining shares owned by testator were bequeathed in trust for his wife for life, and at her death to several of his business associates, including the three previously remembered. *Held,* that all the legacies were specific and the legatees were severally entitled to a *pro rata* distribution of a dividend on the stock, declared within a year of the death of the testator. During a four months' illness of a servant who had been in testator's employ for the fourteen months preceding his death, he paid her medical and hospital expenses and though she was not discharged she received no salary. The hospital expenses were in excess of her wages during her absence, and upon

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resuming work she continued in the service of the testator until his death, seven months later. *Held,* that under a clause of the will reading: "I give and bequeath * * * to each of my other servants who are in my employ * * * at the time of my death and have been so employed by me for not less than one year preceding my death, the sum of five hundred dollars," said servant was entitled to the legacy. Matter of Mitchell, 370.

7. *Construction of — When trust cannot be terminated by merger — Personal Property Law,* § 15.— Where testator, whose estate consisted solely of personal property, gave one-half of it to his executors in trust for the benefit of his daughter for life or until her marriage, the trust is indestructible under section 15 of the Personal Property Law, and her interest in the income cannot be transferred or merged in the remainder so as to terminate the trust. Where the sons of testator predeceased him, the claim of the daughter, his only surviving child, who is still unmarried, to be presently entitled to the possession and enjoyment of the entire estate because of an alleged merger of her interest as sole beneficiary and remainderman, will be denied. While she is immediately entitled to one-half of the estate a successor trustee of the other half will be appointed. Matter of Lee, 511.

8. *When may be admitted to probate — Testamentary provisions — Decedent Estate Law,* § 35.—A testamentary provision in the will of an unmarried testator for one who was his wife at the time of his death is a provision for his "wife" within the meaning of section 35 of the Decedent Estate Law, as amended in 1919, and the will may be admitted to probate subject to the rights of testator's son, not mentioned in the will, as provided in such statute. Matter of Gaffken, 693.

See **Accounting; Executors and Administrators; Guardian; Probate; Transfer Tax; Verdict.**

**WITNESS.**

See **General Business Law.**

**WRIT OF PROHIBITION.**

*City of Utica — Street railways — Increase of fare — Public service commission — Franchises — When motion for alternative writ of prohibition denied.*— The New York State Railways, a domestic corporation operating street surface railroads, among other places, in the city of Utica, having instituted a proceeding before the public service commission for permission to increase its rate of fare, the city, as a basis of demand for an alternative writ of prohibition commanding said corporation and the public service commission to desist from further proceedings in the matter, set up as a bar to the jurisdiction of the public service commission, sixteen franchises granted by the city between May 6, 1886, and January 18, 1907, to said corporation, or its predecessors in interest, all of which franchises were without limitation except that the railway corporation would obey the Railroad Law, including any changes in the rate of fare made by the legislature or its delegated agent, the public service commission. *Held,* that the motion for the alternative writ of prohibition must be denied. Matter of O'Connor v. Public Service Commission, 337.

Ex. C.M.
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